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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 715

**THE ARKANSAS CORPORATION COMMISSION AND
FIFTY-ONE COUNTY TAX COLLECTORS OF AR-
KANSAS, PETITIONERS,**

vs.

**GUY A. THOMPSON, AS TRUSTEE OF MISSOURI
PACIFIC RAILROAD COMPANY, DEBTOR**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

PETITION FOR CERTIORARI FILED JANUARY 22, 1941

CERTIORARI GRANTED MARCH 4, 1941

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[fol. a]

[Caption omitted]

[fol. 1]

**IN DISTRICT COURT OF THE UNITED STATES, EAST-
ERN DIVISION, EASTERN JUDICIAL DISTRICT OF
MISSOURI**

**In the Matter of MISSOURI PACIFIC RAILROAD COMPANY,
Debtor**

**In Proceedings for the Reorganization of a Railroad
No. 6935**

NOTICE OF APPEAL—Filed September 24, 1940

Notice is hereby given that Arkansas Corporation Commission, the members thereof and fifty-one (51) County Collectors of taxes to whom notice was sent of, this proceeding hereby appeal to the Circuit Court of Appeals of the Eighth Circuit from an Order entered in the above entitled action on the 24th day of September, 1940, overruling the Motion to Dissolve the Injunction entered April 11th, 1940, restraining the Trustee from paying taxes therein set out and described on the Trustee's property amounting to \$416,043.17, which were alleged to be excess taxes which had been assessed and levied and warrant therefor in the hands of said Collectors for collection.

The Motion to Dissolve the Injunction referred to was entitled "Motion to Dissolve Injunction and Dismiss the Petition" was filed herein on July 5th, 1940, and the denial of the Motion to Dismiss left continuing the Order of [fol. 2] April 11, 1940, restraining the Trustee from paying the aforesaid amount of taxes to the said County Collectors.

Dated this 24th day of September, 1940.

Jack Holt, Attorney General. Leffel Gentry, Assistant Attorney General. Hill, Fitzhugh & Brizzolara, Special Counsel for the State. Attorneys for Arkansas Corporation Commission, the Members thereof and the aforesaid 51 County Collectors of taxes referred to.

Receipt of copy of above Notice of Appeal acknowledged this — day of September 1940.

Jas. M. Chaney, Attorney for Guy A. Thompson,
Trustee

IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF ERRORS—Filed October 1, 1940

In order to comply with the Rule of Civil Procedure—Rule 75d—and the rules of the Circuit Court of Appeals for the Eighth Circuit—Title II, Rule 24—these appellants hereby make this statement of Points Relied upon and file it with the Designation of the Record, so that it may be part of the transcript.

[fol. 3] Point 1: The Order of April 11, 1940, complained of in the Motion to Dissolve restraining the Trustee from paying \$416,043.17 of taxes assessed and levied on the Trustee's property was in violation of Section 28 of the Judicial Code—United States Code Annotated, Title XXVIII, section 41, in that an order of assessment of a State Board was made after due notice and hearing, and the laws of Arkansas afford a plain, speedy and efficient remedy for the matters and things complained of in the Petition herein, and the matters for which relief is asked in the Petition are such as would give the District Court of the United States jurisdiction solely on the ground that the order was in repugnance to the Constitution of the United States, and the Injunction was improvidently granted and should be dissolved.

Point 2: The taxes alleged in the Petition to be excessive were assessed, levied and warrants for their collection in the hands of County Collectors were imposed by and pursuant to the laws of the State of Arkansas, and the Petitioner had a plain, speedy and efficient remedy in the Courts of Arkansas for relief for the matters complained of in the Petition, and an injunction against their collection was in violation of Section 28 of the Judicial Code, U. S. C. A., Title XXVIII, Section 41.

Point 3: The Petition alleges this court had authority under the Bankruptcy Act of 1938, section 64a Paragraph (4) to ascertain and determine the amount of taxes legally

due and owing, and seek under said section to have the court ascertain the amount due and owing. Whereas the taxes in question are Trustee's taxes and the amount thereof is a part of the necessary expense of preserving the estate of the bankrupt and are classified in Paragraph (1) of said Section 64. Whereas the said Paragraph (4) applies to taxes legally due and owing by the Bankrupt, not the Trustee. The Respondent further alleges that while the Trustee had a right to question the legality of the taxes levied, he was limited under Chapter IV, section 23, Paragraph (b) of the Bankruptcy Act of 1938 to suit in such courts only as the bankrupt could have brought the suit had this proceeding not been instituted and the Bankrupt could not have brought this suit other than in the courts, [fol. 4] either State or Federal, in the State of Arkansas.

Point 4: The Respondent alleges that said Section 64a is no part of Section 77 of the Bankruptcy Act of 1938, as the same is inconsistent therewith.

Point 5: The Petitioner failed to exhaust his administrative remedies before the Corporation Commission, in that it did not file a petition for review as provided in Section 2050 of Pope's Digest as the final administrative remedy provided for an aggrieved tax-payer.

Point 6: The Petitioner had a plain, speedy and efficient remedy provided by the statutes of Arkansas for the matters and things alleged in this Petition for relief therefrom by an appeal from said Corporation Commission to the Pulaski Circuit Court, a court of general jurisdiction in the County of the seat of government of the State of Arkansas, and thence to the Supreme Court of Arkansas, where a judicial review of the assessment could have been had, and without Petitioner having pursued said remedy the injunction was improvidently granted and should be dissolved.

Point 7: The Petitioner does not state a justiciable controversy, in that the allegations stating the basis of the assessment made by the Corporation Commission show that the action of the Corporation Commission in using said basis did not afford a judicial review of their action

other than a statutory right of appeal for setting aside the assessment on the grounds herein alleged.

Jack Holt, Attorney General; Leffel Gentry, Assistant Attorney General; Hill, Fitzhugh & Brizolara, Special Counsel for the State, Attorneys for Arkansas Corporation Commission, the members thereof, and the aforesaid 51 County Collectors of taxes referred to.

[fol. 5] Bond on appeal for \$250.00 approved and filed Sept. 24, 1940, omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF TRUSTEE RELATIVE TO TAXES FOR 1939 ASSESSED AGAINST PROPERTY OF THE TRUSTEE IN ARKANSAS—Filed April 11, 1940.

Comes now Guy A. Thompson, as Trustee of Missouri Pacific Railroad Company, Debtor, (said Trustee being hereinafter called the "Trustee" and said Railroad Company being hereinafter called the "Debtor"), and respectfully presents to the Court:

1. That by order heretofore made by this Court in this proceeding, the Trustee was authorized to pay out of funds coming into his hands all taxes upon the property of Debtor, for the payment of which the Debtor, or the Trustee, is obligated by law.

2. That certain questions hereinafter set forth have arisen with respect to the legality of the general taxes assessed and levied for the year 1939 against the property of the Trust Estate in the State of Arkansas, and with respect to the amount of such taxes which may be legally due and owing to the counties of the State of Arkansas through which the line of railroad formerly owned and operated by said Debtor, and now owned and operated by said Trustee, passes.

3. That by Section 64 of the Federal Bankruptcy Act, as amended June 22, 1938 (11 U. S. C. A., Sec. 104a (4)), it is provided that this Court shall make no order for the

payment of a tax assessed against the property of the Trust Estate in excess of the value of the Debtor's interest therein as determined by the Court, and that in case any question arises as to the amount or legality of any such tax, such question shall be heard and determined by this Court.

[fol. 7] 4. That the power to assess the property of the Trustee within the State of Arkansas for purposes of taxation resides in a commission created and existing under and by virtue of the laws of said state and designated and known as the Arkansas Corporation Commission. By the statutes of the State of Arkansas it is provided that all property, both real and personal, used in the operation of railroad companies shall be assessed for taxation by said Arkansas Corporation Commission. Said statutes further provide that the valuation of the property of all persons, firms, companies and corporations required by law to be assessed by said Commission shall be made upon the consideration of what a clear, fee-simple title thereto would sell for under conditions under which that character of property is usually sold, and further provide that as evidence tending to show what this value would be, the Commission, insofar as other evidence and information in its possession does not make it appear improper or unjust for it to do so, shall ascertain as nearly as it can and consider the market or actual value of all outstanding capital stock and funded debt and the income of such companies. The statutes further provide that when the Commission shall have ascertained the value of the property of any company which it is required to value, such valuation shall be entered in detail in a record to be kept for that purpose, and on or before the first day of July of each year, or as soon thereafter as practicable, it shall be the duty of the Commission to certify out, through its Chairman and Secretary, to the Assessor of each county in which is located or operated any property which it is required to assess so much of the value of said property as has been assigned or apportioned to said county and the districts and towns thereof, and that the Assessor shall enter upon the proper record the assessment so certified, and taxes shall be extended and collection thereof made in like manner as extensions and collections are made in the case of property locally assessed.

5. That Sections 2039 and 2041 of the statutes of the State of Arkansas provide that any person, firm, company, co-partnership, association or corporation engaged in various kinds of business as more fully set forth in said statutes, including any person engaged in the business of operating within, into, from or through said State of Arkansas a railroad as manager, lessee or receiver shall annually, on or before the first day of March in each year, in such form as may be prescribed by the Arkansas Corporation Commission make and deliver to said Commission a statement, under oath, showing in detail various facts, including the name of the company; the status of the company, whether person, firm, company, co-partnership, association or corporation, and under the laws of what state or country organized or incorporated; the location of its present office within and without Arkansas; the name and post-office address of the owner, president, secretary, general manager and agent having control of the company's affairs in the State of Arkansas; the par value of all outstanding capital stock and funded debt of every kind and the market, or if no market, the actual value thereof on the first day of January next preceding the day of said report; the total gross revenue, expense, net revenue and net income, separately, from utility operations, non-utility operations, and non-operating properties, for the next preceding calendar year both for the State of Arkansas and all states, including the State's due proportion of revenues, expenses and income from interstate business; the total value of all real estate and personal property owned or controlled by said company on the first day of January next preceding, showing separately that part used in connection with the daily operations of the company and that part used otherwise; a detailed statement of all real and personal property owned or controlled by the company and situated in Arkansas on the first day of January next preceding, giving description, location and value thereof, and showing separately that part used in connection with the daily operations of the company and that part used otherwise; and such other and additional information as to ownership, amount, kind, location, operation and value of property owned or controlled as the Commission may require; that the time for filing said report by said Trustee, as called for in said statutes, was by said Arkansas Corporation Commission extended until the first day of May,

1940, and that within said time said report showing all of the information called for in said statutes was by this Trustee duly filed with said Commission on forms provided [fol. 9] by it; that on or about November 13, 1939, said Corporation Commission, after examining returns on file and making certain investigations, determined what it considered the true, full cash value for assessment for taxation of the entire portion of the railway system or plant formerly owned by the Debtor, title to which is now vested in this Trustee, located within the State of Arkansas, which was, for the year 1939, the sum of \$28,050,000; immediately upon receipt of notice of said assessment, to-wit, on November 17, 1939, your Trustee advised said Corporation Commission of his dissatisfaction with said assessment and filed with said Arkansas Corporation Commission a formal notice of protest of said assessment and asked for a reconsideration and readjustment thereof; that thereafter a final hearing was held before said Commission on December 4, 1939, at which time this Trustee's protest was overruled by said Arkansas Corporation Commission and the final assessment of the properties of said Trustee in the State of Arkansas was set by said Commission at the sum of \$28,050,000, and that distribution and apportionment thereof was on December 5, 1939, certified by said Commission, through its Chairman and Secretary, to the Assessors of the several counties in the State of Arkansas in which the property of said Trustee is located, which distribution and apportionment was as follows:

County	Valuation
Arkansas	\$ 43,000
Ashley	899,291
Baxter	401,435
Boone	315,071
Bradley	47,241
Chicot	653,142
Clark	1,184,008
Clay	500,585
Conway	415,433
Craighead	310,869
Crawford	512,167
Crittenden	672,605
Cross	986,647
Desha	1,139,906

County	Valuation
Drew	404,352
Faulkner	362,563
[fol. 10] Franklin	560,698
Garland	371,131
Grant	164,781
Greene	609,717
Hempstead	678,453
Hot Spring	584,823
Howard	74,090
Independence	555,198
Izard	440,191
Jackson	1,004,406
Jefferson	911,703
Johnson	688,317
Lawrence	559,422
Lee	442,293
Lincoln	251,013
Logan	130,640
Lonoke	400,431
Marion	249,434
Miller	647,300
Monroe	345,910
Montgomery	88,615
Nevada	309,629
Onachita	587,599
Phillips	869,617
Pike	158,479
Poinsett	271,857
Pope	524,513
Pulaski	2,394,676
Randolph	56,301
Saline	856,506
Sebastian—Greenwood Dist.	241,433
Ft. Smith Dist.	209,182
St. Francis	342,674
Union	886,491
White	1,306,003
Woodruff	428,159
	<hr/>
	\$28,050,000

6. That by the Constitution of the State of Arkansas in Article XVI, Section 5 thereof, it is provided that "all

[fol. 11] property subject to taxation shall be taxed according to its value (a), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the state (b) no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

7. The value fixed by said Arkansas Corporation Commission as aforesaid represents an increase of \$3,765,570 over the assessed value of the properties of your Trustee in said state as fixed by said Commission for the year 1937, notwithstanding the fact that due to general business conditions and increased competition the traffic transported over the lines operated by your Trustee was constantly decreasing and the net earnings derived from said business was diminishing and, according to any true measure or criterion of value, the value of the properties of said Trustee in the State of Arkansas was growing less each month.

8. That said Arkansas Corporation Commission has failed and refused to disclose to your Trustee the basis upon which said assessment for the year 1939 in the sum of \$28,050,000 was arrived at, but said assessment is only \$64,960, or less than one-fourth of one per cent, less than the assessment upon your Trustee's properties in the State of Arkansas for the year 1938 which was in the amount of \$28,114,960 and that your Trustee was informed by said Arkansas Corporation Commission, and verily believes that said assessment for 1938 was based upon an allocation factor representing the per cent of said property in the State of Arkansas of 28.39411% of a system value of \$247,565,396, to which is applied an equalization factor of 40%, being the maximum per cent of full value at which other property is assessed by said Commission in the State of Arkansas; also that said system value of \$247,565,396 was arrived at by a composite average of various factors in which 25% consideration was given to stock and bond values for the five years preceding the year 1938; 25% to Capitalized Earnings for said period of five years at the rate of 6% per annum; 25% consideration to reproduction cost less depreciation as found by the I. C. C.; 12½% to [fol. 12] book value of said properties as carried on the books of said Missouri Pacific Railroad Company and 12½% consideration to Gross Revenue for said five year

period (the source of said Gross Revenue and the properties from which obtained being unknown to your Petitioner), by reason whereof and by reason of the close approximation of said assessment for 1939, in the sum of \$28,050,000, to said assessment for the year 1938 in the sum of \$28,114,960, your Trustee states that said assessment for the year 1939 is based on a system value of \$246,970,234 arrived at by a composite average of the same factors as hereinabove set forth.

Your Petitioner states that said Interstate Commerce Commission value is based on the reproduction cost less depreciation of said properties as found by said Commission and that the book value of said properties to which a consideration of $12\frac{1}{2}\%$ is applied by said Corporation Commission in finding its said system value, represents the original cost of said properties as shown on the books of the Missouri Pacific Railroad Company.

Your Petitioner further states that the result of giving a consideration of 25% to said Interstate Commerce Commission value and of $12\frac{1}{2}\%$ to said book value ascribes a total consideration of $37\frac{1}{2}\%$ to the original cost of said properties and thereby gives to said original cost an entirely disproportionate consideration as contrasted with the market value of stocks and bonds and Capitalized Earnings of said properties which are more dependable and accurate bases for measuring the present day value of said properties and the price or sum for which said properties would sell at the present time.

Your Petitioner further states and avers that said basis of valuation as employed by said Corporation Commission is erroneous in that consideration is given therein to the Gross Revenue of certain properties which, your Petitioner avers, is no fair or proper criterion in the determination of true value.

9. In fixing the value as aforesaid of your Petitioner's properties for the year 1939 the Arkansas Corporation Commission ascribed an undue and improper weight to the [fol. 13] cost of reproducing said properties and failed to give due consideration to the collapse of values of all classes of property, including properties of railroad common carriers, which began in 1929 and has continued ever since, and to the great economic changes which have taken place within that period affecting the value of all classes of prop-

erty, including the properties of your Trustee, as the result of the nation-wide general business depression.

Your Petitioner further avers that said Arkansas Corporation Commission, in fixing said value, failed to give due consideration to the increased competition of other forms of transportation which has greatly reduced the earnings of the Trust Estate and caused an enormous loss in the value of said properties.

10. Your Petitioner states and avers that upon the basis of fair and accurate methods for the determination of the system value of said properties and the proper allocation thereof to the State of Arkansas with an equalization factor of 40%, the total value of all properties owned and used by your Petitioner in the State of Arkansas included in said assessment, as fixed by said Arkansas Corporation Commission for the year 1939, should not exceed the sum of \$16,830,000.

11. That the respective county officers of the several counties hereinbefore mentioned, through which the Trustee's line of railroad extends, have duly extended on the assessment rolls of said respective counties the assessment so certified by said Arkansas Corporation Commission, and have applied on said tax rolls of said counties the various levies in effect for state, county, city, town, school district and other purposes, and in accordance with the statutes in such case made and provided, the tax lists and tax warrants have been issued and delivered directing the Tax Collectors of the several counties to collect the taxes for 1939 arising from the tax rolls made up as aforesaid, and said Tax Collectors now have in their possession said tax rolls made up as aforesaid and will endeavor to collect the taxes levied on said unjust and illegal values of the property of the Trustee made as aforesaid by said Arkansas Corporation Commission.

[fol. 14] That the taxes levied against Trustee's property in each of said counties through which the Trustee's line of railroad runs are as set forth in the following statement, wherein is shown the increase in taxes in each county resulting from said unjust and illegal and increased valuation certified by said Arkansas Corporation Commission over the fair and reasonable value of properties of said Trustee in each of said counties.

[cols. 15-16]

County	Tax Collector	Valuation	Statutory Taxes Based on Corporation's Assessment	Statutory Taxes Based on Maximum Valid Assessment	Excess
Arkansas	Lloyd La Fargue	\$43,000	\$1,446.95	\$868.17	\$578.78
Ashley	J. W. Spivey	899,291	32,070.68	19,242.41	12,828.27
Baxter	Jim Martin	401,435	13,066.98	7,840.19	5,226.79
Boone	Hugh Burlison	315,071	11,211.89	6,727.13	4,484.76
Bradley	C. W. Hickman	47,241	1,720.20	1,032.12	688.08
Chicot	C. Merritt	653,142	23,548.17	14,128.90	9,419.27
Clark	A. N. Shaw	1,184,008	43,908.51	26,345.11	17,563.40
Clay	Dan McLeod	500,585	18,709.70	11,225.82	7,483.88
Conway	Elmer Thomas	415,433	17,418.44	10,451.06	6,967.38
Craighead	Leon G. Brown	310,869	10,185.58	6,111.35	4,074.23
Crawford	Fred Patton	512,167	19,085.88	11,451.53	7,634.35
Crittenden	J. H. Curlin	672,605	22,675.26	13,605.16	9,070.10
Cross	C. M. Stacy	986,647	34,667.24	20,800.34	13,866.90
Deaha	H. L. Clayton	1,139,906	49,969.77	28,613.98	21,355.79
Drew	W. C. Cruce	404,352	14,438.92	8,963.35	5,475.57
Faulkner	R. E. Speaker	362,563	14,421.13	8,652.68	5,768.45
Franklin	Champ Crawford	560,698	18,995.52	11,397.31	7,598.21
Garland	Mack Wilson	371,131	13,794.39	8,270.63	5,513.76
Grant	Wilbur B. Paxton	164,781	5,877.37	3,526.42	2,350.95
Greene	Barney Elmore	609,717	21,954.81	13,172.89	8,781.92
Hempstead	Clarence E. Baker	678,453	24,934.07	14,960.44	9,973.63
Hot Spring	T. S. Fisher	584,823	21,714.81	13,028.89	8,685.92
Howard	Jones Floyd	74,090	2,746.82	1,648.09	1,098.73
Independence	Forrest Jeffery	555,198	20,062.32	12,037.39	8,024.93
Iard	D. O. Johnson	440,191	15,913.45	9,548.07	6,365.38
Jackson	Edwin McCall	1,004,406	37,331.70	22,399.02	14,932.68
Jefferson	Garland Brewster	911,703	31,568.79	18,941.27	12,627.52
Johnson	Carl Arrington	688,317	28,056.09	16,833.65	11,222.44
Lawrence	Cleo Moody	559,422	20,619.88	12,371.93	8,247.95
Lee	S. C. Langston	442,293	15,877.84	9,526.70	6,351.14
Lynch	Tebo Cogbill	251,013	8,078.56	4,847.14	3,231.42
Logan	W. W. Carolan	130,640	4,837.52	2,902.51	1,935.01

Lonoke.....	R. E. Brians.....	400,431	14,504.69	8,702.82	5,801.87
Marion.....	Gus McCracken.....	249,434	9,050.31	5,430.19	3,620.12
Miller.....	Jewell Evers.....	647,300	26,752.07	16,061.24	10,700.83
Monroe.....	H. K. McKenzie.....	345,910	12,325.27	7,395.16	4,930.11
Montgomery.....	John Johnson.....	88,615	3,384.68	2,030.81	1,353.87
Nevada.....	Brad Bright.....	309,629	11,088.91	6,653.35	4,435.56
Onachita.....	Edgar Pryor.....	587,599	21,759.49	13,055.69	8,703.80
Phillips.....	F. F. Kitchens.....	869,617	31,327.26	18,796.36	12,530.90
Pike.....	W. E. Branch.....	158,479	6,460.48	3,876.29	2,584.19
Poinsett.....	C. T. Sullivan.....	271,857	10,211.92	6,127.15	4,084.77
Pope.....	D. A. Bewley.....	524,513	19,866.58	11,919.95	7,946.63
Pulaski.....	L. B. Branch.....	2,394,676	92,181.44	55,308.86	36,872.58
Randolph.....	Roland Morris.....	56,301	2,074.84	1,244.90	829.94
Saline.....	M. P. Crow.....	856,506	30,990.13	18,594.08	12,396.05
Sebastian:					
Greenwood Dist.....	Jack Pace.....	241,433	8,413.38	5,048.03	3,365.35
Ft. Smith Dist.....	Jack Pace.....	209,182	8,293.30	4,975.98	3,317.32
St. Francis.....	John I. Jones.....	342,674	12,623.97	7,574.38	5,049.59
Union.....	Grady R. Woolley.....	886,491	32,619.73	19,571.84	13,047.89
White.....	Barney Harsteel.....	1,306,003	46,580.42	27,948.25	18,632.17
Woodruff.....	E. T. Ramsey.....	428,159	15,280.09	9,168.05	6,112.04
Totals.....		\$28,060,000	\$1,036,688.20	\$620,645.03	\$416,043.17

[fol. 17] The foregoing amounts do not include land locally assessed, the valuation of, and the taxes upon which, were not fixed by said Arkansas Corporation Commission.

12. That it is provided in the statutes of the State of Arkansas, Section 13826, Pope's Digest for 1937, that taxes shall become due and payable, one-fourth on or before the third Monday in April; one-fourth on or before the third Monday in July and the remaining one-half on or before the First of October in each year; and that all taxes remaining unpaid after the periods above specified shall be considered as delinquent and a penalty of 10% assessed against the taxpayer failing to pay taxes within the time limits specified.

13. That your Trustee has been advised by Counsel, and therefore states, that said action of said Corporation Commission of the State of Arkansas in increasing the assessment of Trustee's properties within said state as aforesaid, was illegal, unconstitutional and invalid, and should be set aside and disregarded for the following reasons:

(a) Said action of said Corporation Commission, was arrived at by giving undue consideration to original costs and ignoring the fact that, due to general business conditions, the material reduction in values of all classes of property and the virtual collapse of values of railroad property, due in part to the rapid increase of competition of transportation by motor vehicles, water and air transport and pipe lines and electric power lines, with resultant great and permanent reduction of the earnings of the Trustee's properties and the great reduction in the actual market value of said properties, all of which facts were well known to said Commission, the assessed value of Trustee's properties should in truth and in fact be materially reduced beneath the assessment for previous years whereas the proposed assessment made by said Commission and certified to the Collectors of said several counties as aforesaid involves an actual increase in the assessment of said properties in the sum of \$3,765,570 or more than 16% above the assessment for the year 1937.

(b) Said action of said Corporation Commission will result in unlawfully exacting from the Trustee as taxes on [fol. 18] said properties in Arkansas an amount greatly in excess of Trustee's fair and equitable share of the tax burden

of said state, in violation of Section 5 of Article XVI of the Constitution of the State of Arkansas, which provides that all property shall be taxed according to its value and that no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, and that all values shall be ascertained so as to make same equal and uniform throughout the state. The Trustee's property in Arkansas has been assessed for 1939, and for many years prior to 1939, at more than its full and actual value after giving consideration to an equalization factor of the same amount as that applied to other classes of property in said state. Such discrimination has been arbitrary and has been practiced over a period of years with the result of compelling the Debtor and the Trustee to pay grossly excessive, unequal and disproportionate shares of the taxes of said counties and permitting other taxpayers in said counties to escape payment of a fair, equal and just share of the taxes levied in said counties; that over assessment has been so persistent and so material and has imposed upon said Trustee, with respect to taxes upon properties owned and operated by him in said State of Arkansas, so undue and disproportionate a share of the taxes in said state as to amount to a constructive fraud and to deprive said Trustee of his property without due process of law and to deny the said Trustee the equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

14. That it is in the interest of the Trust Estate and of all parties interested that a determination of the amount and legality of the taxes to be paid by the Trustee on said property for 1939 may be had without unnecessary delay in order that it may be ascertained whether said property must bear said excessive and unlawful exaction of \$416,043.17, which is the amount of taxes in dispute, arising out of the 1939 assessment hereinbefore complained of; that the taxes based on said assessment now constitute a lien on the property of the Trustee in Arkansas and such lien casts a cloud upon the Trustee's title to said property, the removal of which will be a necessary step in the consummation of Debtor's reorganization.

[fol. 19] Wherefore, the Trustee respectfully prays:

(1) That this Court hear and determine the question of the amount and legality of the taxes assessed for the year

1939 against the property of the Trustee in Arkansas, and if the Court be so advised, that such matter be referred to a Special Master as provided in Section 77 (c) (13) of the Bankruptcy Act, with direction to hear the evidence of all interested parties with respect to said question, under such reasonable rules and after such notice as the Court may prescribe, and to render his report and findings thereon for such action as to the Court may seem meet and proper.

(2) That the Trustee be authorized to pay or tender payment, to the Collectors of said respective counties, by April 15, 1940, or as soon thereafter as possible, one-fourth of the ad valorem taxes (payable in installments) plus all of any special improvement taxes (not payable in installments) based upon the maximum proper assessment of said properties as set forth in paragraph 11 of this Petition, in the aggregate sum of \$620,645.03, or the sum of \$157,665.54, and, on or before July 15, 1940, to pay or tender payment to said Collectors an additional one-fourth of said ad valorem taxes and on or before October 1, 1940, to pay or tender payment to said Collectors the remaining one-half of the ad valorem taxes based upon the maximum proper assessment of said properties as set forth in paragraph 11 of this Petition, but, pending the determination by this Court of the amount and legality of the taxes assessed against the property of the Trustee in the said respective counties for the year 1939, to withhold and refrain from paying to the Collectors of said counties any further taxes based on the assessment heretofore made by said Corporation, Commission, until further order of this Court.

(3) That the Trustee have such other authority and direction in the premises, as to the Court may seem proper.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor. Russell L. Dearmont, James M. Chaney, Counsel for Trustee.

[fol. 20] *Duly sworn to by T. M. Corwin. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTING FOR HEARING PETITION OF DEBTOR'S TRUSTEE
RELATIVE TO TAXES FOR 1939 ASSESSED AGAINST PROPERTY
OF THE TRUSTEE IN ARKANSAS, AND AUTHORIZING TRUSTEE
TO TENDER AMOUNTS CONCEDED BY HIM TO BE DUE—Filed
April 11, 1940

[fol. 21] Guy A. Thompson, as Trustee of the Debtor, Missouri Pacific Railroad Company, having this day filed herein and presented to the Court and its Judge his petition entitled "Petition of Trustee relative to taxes for 1939 assessed against property of the Trustee in Arkansas," it is

Ordered:

(1) That said petition be, and hereby is, set for hearing before the Court and the Judge thereof at its court room at St. Louis, Missouri, on the 3rd day of May, 1940, at ten o'clock A. M., or as soon thereafter as the matter can be heard.

(2) That said Trustee shall give notice of said hearing, which notice is hereby found and declared to be reasonable and sufficient:

(a) By sending or causing to be sent, by United States mail, postage prepaid, to all parties who customarily receive printed copies of the record in this proceeding, or their attorneys of record, at least 15 days prior to the date herein set for the hearing, true copies of said petition and of this order;

(b) By sending or causing to be sent through registered mail, postage prepaid, at least 15 days prior to date herein set for hearing, a true copy of said petition and of this order, addressed to the Attorney General for the State of Arkansas, to each member of the Arkansas Corporation Commission and to each of the County Collectors of the fifty-one counties of the State of Arkansas in which taxes against the property of the Trustee have been levied for the year 1939.

(3) That the Trustee be, and he is hereby authorized to pay, or to tender payment to the Collectors of the counties hereinafter named, by April 15, 1940, or as soon thereafter as possible, one-fourth of the ad valorem taxes (payable in installments) plus all of any special improvement taxes (not payable in installments) based upon the maximum [fol. 22] proper assessment of said properties as conceded by said Trustee, and on or before July 15, 1940, an additional one-fourth of the ad valorem taxes based upon such maximum proper assessments, and on or before October 1, 1940, to pay or tender payment to said Collectors the remaining one-half of the ad valorem taxes based upon said maximum proper assessment—said several counties and the amounts to be paid as hereinbefore set forth, being as follows:

County	Tax Collector	Due 4/15/40	Due 7/15/40	Due 10/1/40	Total
Arkansas.....	Lloyd LaFargue.....	\$217.05	\$217.04	\$434.08	\$868.17
Ashley.....	J. W. Spivey.....	4,810.60	4,810.60	9,621.21	15,242.41
Baxter.....	Jim Martin.....	1,960.05	1,960.05	3,920.09	7,840.19
Boone.....	Hugh Burlison.....	1,681.78	1,681.78	3,363.57	6,727.13
Bradley.....	C. W. Hickman.....	258.03	258.03	516.06	1,032.12
Chicot.....	C. Merritt.....	3,532.23	3,532.23	7,064.44	14,128.90
Clark.....	A. N. Shaw.....	6,586.28	6,586.28	13,172.55	26,345.11
Clay.....	Dan McLeod.....	2,806.45	2,806.46	5,612.91	11,225.82
Conway.....	Elmer Thomas.....	2,612.75	2,612.77	5,225.77	10,451.06
Craighead.....	Leon G. Brown.....	1,527.84	1,527.84	3,055.67	6,111.35
Crawford.....	Fred Patton.....	2,862.88	2,862.88	5,725.77	11,451.53
Crittenden.....	J. H. Curlin.....	3,401.29	3,401.29	6,802.58	13,605.16
Cross.....	C. M. Stacey.....	5,200.09	5,200.09	10,400.16	20,800.34
Desha.....	H. L. Clayton.....	9,431.61	9,431.61	18,863.22	37,726.42
Drew.....	W. C. Cruce.....	2,165.84	2,165.84	4,331.67	8,663.35
Faulkner.....	R. E. Speaker.....	2,163.17	2,163.17	4,326.34	8,652.68
Franklin.....	Champ Crawford.....	2,849.33	2,849.33	5,698.65	11,397.31
Garland.....	Mack Wilson.....	2,067.66	2,067.66	4,135.31	8,270.63
Grant.....	Wilbur B. Paxton.....	881.61	881.60	1,763.21	3,526.42
Greene.....	Barney Elmore.....	3,293.22	3,293.22	6,586.45	13,172.89
Hempstead.....	Clarence E. Baker.....	3,924.86	3,924.86	7,849.72	15,699.44
Hot Spring.....	T. S. Fisher.....	3,257.22	3,257.22	6,514.45	13,028.89
Howard.....	Jones Floyd.....	412.03	412.02	824.04	1,648.09
Independence.....	Forrest Jeffery.....	3,050.74	2,995.55	5,991.10	12,037.39
Izard.....	D. O. Johnson.....	2,387.02	2,387.02	4,774.03	9,548.07
Jackson.....	Edwin McCall.....	5,599.75	5,599.76	11,199.51	22,399.02
Jefferson.....	Garland Brewster.....	4,735.32	4,735.32	9,470.63	18,941.27
Lawrence.....	Carl Arrington.....	4,208.41	4,208.41	8,416.83	16,833.65
Lee.....	Cleo Moody.....	3,092.98	3,092.98	6,185.97	12,371.93
Lincoln.....	S. C. Langston.....	2,381.67	2,381.67	4,763.36	9,526.70
Logan.....	Tebo Cogbill.....	1,211.79	1,211.78	2,423.57	4,847.14
Lonoke.....	W. W. Carolan.....	725.63	725.63	1,451.25	2,902.51
Marion.....	R. E. Brians.....	2,175.71	2,175.70	4,351.41	8,702.82
	Gus McCracken.....	1,357.55	1,357.55	2,715.09	5,430.19

County	Tax Collector	Due 4/15/40	Due 7/15/40	Due 10/1/40	Total
Miller	Jewell Evers	4,012.81	4,012.81	8,025.62	16,051.24
Monroe	H. K. McKenzie	1,848.79	1,848.79	3,697.58	7,395.16
Montgomery	John Johnson	507.70	507.70	1,015.41	2,030.81
Nevada	Brad Bright	1,663.34	1,663.34	3,326.67	6,653.35
Quachita	Edgar Pryor	3,263.92	3,263.92	6,527.85	13,055.69
Phillips	F. F. Kitchens	4,699.09	4,699.09	9,398.18	18,796.36
Pike	W. E. Branch	969.07	969.07	1,938.15	3,876.29
Poinsett	C. T. Sullivan	1,531.79	1,531.79	3,063.57	6,127.15
Pope	D. A. Bewley	2,979.99	2,979.99	5,959.97	11,919.95
Pulaski	L. B. Branch	13,827.22	13,827.21	27,654.43	55,306.86
Randolph	Roland Morris	311.23	311.22	622.45	1,244.90
Saline	M. P. Crow	4,648.52	4,648.52	9,297.04	18,594.08
Sebastian	Jack Pace	1,262.01	1,262.01	2,524.01	5,048.03
Greenwood Dist.	Jack Pace	1,244.00	1,243.99	2,487.99	4,975.98
Ft. Smith Dist.	John I. Jones	1,893.59	1,893.59	3,787.20	7,574.38
St. Francis	Grady R. Woolley	4,892.96	4,892.96	9,785.92	19,571.84
Union	Barney Hartsell	6,987.06	6,987.06	13,974.13	27,948.25
White	E. T. Ramsey	2,292.01	2,292.01	4,584.03	9,168.05
Woodruff					
Totals		\$157,665.54	\$154,326.49	\$308,653.00	\$620,645.03

[fol. 25] and that the Trustee, until further order of this Court, be, and he is hereby, authorized and order to withhold, and refrain from paying to the Collectors of said respective counties, any additional taxes for the year 1939 based on the assessment heretofore made upon the properties of the Trustee in said state by the Corporation Commission of the State of Arkansas, pending the determination by this Court of the amount and legality of the taxes assessed against the property of the Trustee in said respective counties for the year 1939.

Done this 11th day of April, 1940.

By the Court:

Geo. H. Moore, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISSOLVE INJUNCTION AND DISMISS PETITION—
Filed July 5, 1940

Comes the Respondent herein, the Arkansas Corporation Commission, hereinafter referred to as "Respondent" or the "Commission," on behalf of itself and the fifty-one (51) Tax Collectors in Arkansas where taxes are assessed against the Missouri Pacific Railroad Company, pursuant [fol. 26] to Order of said Commission, and moves the Court to dissolve the Order of April 11th, 1940, wherein the Trustee was directed to withhold and refrain from paying the taxes assessed by the Commission in said several counties, which were in excess of the amounts which the Trustee alleged should have been proper assessments in said counties.

The difference between the assessed taxes authorized to be paid under said Order and the amount determined by the Commission was the sum of \$416,043.17, the collection of which was effectually enjoined by said Order, and for cause thereof alleges:

That on April 11th, 1940 the Trustee presented to this Court a petition relative to the taxes assessed against the property of the Trustee in Arkansas.

That the Petition bases jurisdiction in this court to hear and determine the matters and things therein set forth solely on Section 64 of the Bankruptcy Act of 1938 (USCA 104a (4)).

The petition alleged that the proposed bases of the assessment made by the Corporation Commission for ascertaining the System Value and the bases for allocation to Arkansas of its proportion of the System Value and the Bases of Equalization of such value with the assessment of other property in Arkansas.

The Petition further alleged the proper bases for assessing the System Value and alleges that the purported bases used by the Commission was wrong for reasons therein alleged, and uses in its computation of the taxes which it should pay to the State of Arkansas the same allocation factor and Equalization factor which he alleged that the Corporation Commission used, thereby leaving the only issue for adjudication the value of its system, being the difference in that found by the Corporation Commission and that alleged in the Petition to be the true system value.

The Petition alleged that the System Value found by the Commission was \$246,970,234 resulting in a state valuation of \$28,050.00; that the valuation in Arkansas on the [fol. 27] proper bases for the System Value would not exceed \$16,830,000 and pray for authority to pay the taxes upon the valuation in Arkansas of \$16,830,000.00, and for an order of the Court requiring the Trustee to withhold and refrain from paying the tax Collectors in the 51 counties in Arkansas, wherein the taxes were levied, the difference between the taxes upon the System Value found by the Commission and that alleged by the Petition to be the correct value amounting to the sum of \$416,043.17.

Whereupon the Court on April 11, 1940 authorized the payment of the taxes on the valuation alleged by the Petition and regarding said excess which was ordered withheld of \$416,043.17 made this Order, to-wit:

"And that the Trustee, until further order of this Court, be, and he is hereby, authorized and ordered to withhold, and refrain from paying to the Collectors of said respective counties, any additional taxes for the year 1939 based on the assessment heretofore made upon the properties of the Trustee in said state by the Corporation Commis-

sion of the State of Arkansas, pending the determination by this Court of the amount and legality of the taxes assessed against the property of the Trustee in said respective counties for the year 1939."

That said Order suspending and restraining the payments of the taxes assessed for collection in said several counties over and above the amount proposed by the Trustee has continued in full force and effect from said date until now, and has effectually enjoined the collection of said taxes, amounting to the aforesaid sum of \$416,043.17.

The Respondent moves the Court to dissolve said Injunction of April 11th, 1940 and dismiss the Petition for each of the following reasons, to-wit:

First. That said Order restraining the payment of \$416,043.17 taxes assessed against the Trustee's properties in 51 counties in Arkansas in amounts set forth, is in violation of Section 24 of the Judicial Code (USCA, Title 28, Section 41) wherein the Amendments of 1934 and 1937 are included.

[fol. 28] That the final assessment of the Trustee's property on December 4th, 1939 was an order of a Board of the State where reasonable notice was given by said Board and where full hearing before it was had and where a plain, speedy and efficient remedy was available to the Petitioner in the courts in the State of Arkansas for the matters and things alleged in his petition herein as constituting the assessment invalid by pursuing the remedies therefor in Sections 2019 and 2020 of Pope's Digest.

This Respondent alleges pursuant to said Act of Congress no District Court shall have jurisdiction of such suit.

Wherefore, it prays that said Injunction be dissolved and the Petition dismissed.

Second. This Respondent alleges that the assessment made by it on December 4, 1939 was the basis for a tax imposed by and pursuant to the laws of the State, and that taxes accruing in each county thereunder as set forth in the Petition herein were taxes imposed by the laws of the State of Arkansas, and in the hands of the Collectors of each of said counties to collect the same from the Trustee.

The Respondent further alleges that this Order of April 11, 1940, suspends, enjoins and restrains the assessment levied and collection of the tax as above stated, and that the Trustee as tax payer has a plain, speedy and efficient

remedy in the courts in Arkansas for relief against said taxes upon the grounds he alleged in his Petition by pursuing the remedies provided in Sections 2019 and 2020 of Pope's Digest.

Wherefore, the Respondent alleges that pursuant to said Act of 1937 no District Court of the United States has jurisdiction to entertain such suit, and it prays that this Order enjoining, suspending and restraining the collection of said taxes as aforesaid, be dissolved and this Petition dismissed.

Third. The Petition is based on the assumed authority given the District Court in Bankruptcy under Section 64a, Paragraph 4 of the Bankruptcy Act of 1938.

[fol. 29] This Respondent alleges that said section is a section of the General Bankruptcy Act establishing the priority of debts in a bankrupt estate, which is the necessary office of the Bankruptcy Court in the liquidation of estates, and that if applicable to proceedings under Section 77, which will be referred to hereafter, it does not apply to the \$416,043.17 of taxes, the payment of which is restrained. That said taxes are taxes against the Trustee and are not taxes against the bankrupt estate, which are the taxes over which this court is given jurisdiction to establish priority and to determine the legality and amount thereof, in order to properly ascertain the priority in the liquidation of such estates.

The Judicial Code, Section 65, USCA, Title 28, Section 124, provides that whenever a cause is pending in any court of the United States and there shall be a Receiver or manager in possession of such property, he shall manage and operate the same according to the requirements of all valid laws of the state in which said property is situated, in the same manner that the owner would be bound if in possession thereof.

The Respondent alleges that the Trustee is in possession of the property of the Debtor of the Debtor in Arkansas, operating the same under orders of this Court and said Act is applicable to him. That there was an amendment to said section, which is 124a, Title 28, providing that a Trustee, inter-alia, appointed by any United States Court, who is authorized by the court to conduct any business, or who does conduct any business, shall be subject to all state and local taxes applicable to such business the same as if such business were conducted by an individual or corpora-

tion. That this Trustee is authorized to conduct this business by this Court and does conduct it, and he is subject to all state and local taxes applicable to said business the same as if such business were conducted by an individual or corporation. That the taxes assessed herein are not assessed against the Missouri Pacific Railway Company; they are assessed against the Trustee, and such taxes assessed against him are part of the expenses which section 64a of said Bankruptcy Act (if applicable at all to proceedings [fol. 30] under section 77 to which reference will later be made), shall be first in priority.

This Respondent alleges that these taxes now assessed accrued subsequent to the filing of the Petition and appointment of the Trustee.

This Respondent further alleges that the second and third priorities established in said 64a are not relevant here, and the 4th Priority upon which the Petitioner relies in his Petition for authority of this Court to review this assessment provides:

“Taxes legally due and owing by the Bankrupt to the United States, or any state or sub-division thereof.”

That if the State of Arkansas, or any political sub-division have taxes due it by the Missouri Pacific Railway Company prior to bankruptcy, the legality and amount of such taxes would be a proper subject of jurisdiction of this Court, if said section is applicable to proceedings under section 77; and it is in the context and meaning not applicable to the taxes assessed against the Trustee subsequent to the filing of the Petition; and those taxes are assessed against him, as any other individual or corporation in Arkansas, and he is required to pay the same subject only to his right to attack in the courts of Arkansas the legality of said taxes on such grounds as he has set forth in his Petition.

This Respondent alleges that no Federal or other court has jurisdiction to pass upon the legality of the assessments made by the Corporation Commission of Arkansas except the courts of Arkansas wherein a plain, speedy and efficient remedy is provided for all such matters as this Trustee alleges has occurred in the making of said assessment.

This Respondent further alleges that the General Bankruptcy Act of 1938, Chapter IV, Section 23, dealing with

the jurisdiction of the United States and State Courts, paragraph "b" is as follows:

"Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under [fol. 31] this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this act."

This Respondent alleges that said section is applicable to this Trustee, and it is consistent with the proceedings under section 77 to incorporate therein Paragraph (b), section 23.

Wherefore, The Respondent prays that the Restraining Order be dissolved and this suit dismissed, as beyond the jurisdiction of this court.

Fourth. This Respondent alleges that 64a of the Bankruptcy Act of 1938 is no part of section 77 of the Bankruptcy Act, and no part of it is applicable to proceeding under section 77 of the Bankruptcy Act.

Paragraph (1) of Subdivision 13 of Section 77, provides that in proceedings under this section "and consistent with the provisions thereof" the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors and all persons with respect to the debtor and his property shall be as if a voluntary petition for adjudication had been filed and a decree of adjudication entered on the day the debtor's petition was filed.

Section 64a refers entirely to unsecured creditors who are to be paid in advance of payment of dividends and establishes the priority among them, and is inconsistent with railroad reorganization proceedings where the payment of claims secured and unsecured and their priorities is effectuated through consent of two-thirds of the creditors after approval by the Interstate Commerce Commission and the court, save in exceptional cases where the same may be approved by the court, where it is fair and equitable and does no injustice under the bankruptcy power.

Under section 77 there can be no liquidation except through adoption of the Plan, either through creditors and stockholders' approval or enforced adoption by the Court. [fol. 32] Under this Section if the Plan of Reorganization fails, the action is dismissed and there is no place ever in

a railroad reorganization proceedings for the application of 64a.

Wherefore, said 64a invoked in this Petition as the sole basis of jurisdiction of this court is not applicable, and the restraining order, restraining the payment of the taxes involved here was improperly granted and its dissolution and dismissal of the Petition is prayed.

Fifth. The Petition fails to allege that the Trustee exhausted his administrative remedy before seeking judicial relief herein. That Section 2050 of Pope's Digest provides an administrative remedy for review of an assessment after it is completed within 30 days, upon presentation for hearing thereof of a petition for review and the statute provides time for the Commission to certify changes to the Counties which may be made by it on hearing the petition for review. The failure of the petitioner to set forth the exhaustion of said administrative remedy leaves no standing for judicial review thereof, and the petition fails therefore to state a cause of action for judicial review.

Wherefore, the Respondent prays that said Injunction be dissolved and the Petition dismissed.

Sixth. The Petition alleges that the System Value of \$246,970.00 was arrived at by this Respondent "By a composite average of various factors in which 25% consideration was given to stock and bond values for the five years preceding the year 1938; 25% to Capitalized Earnings for said period of five years at the rate of 6% per annum; 25% consideration to reproduction cost less depreciation as found by the I. C. C.; 12½% to book value of said properties as carried on the books of said Missouri Pacific Railroad Company and 12½% consideration to Gross Revenue for said five-year period."

That each and every factor alleged to have been used by the Respondent was a factor commonly considered by commissions and courts in ascertaining value in taxation, rate making and condemnation proceedings.

[fol. 33] These Respondents are required by the statutes of Arkansas as found in section 2044 of Pope's Digest to consider each and every of the factors alleged in the Petition to have been considered by it in making this assessment unless other evidence and information in its possession renders it in their judgment improper or unjust to do so.

These factors and their use are described in the Government Publication entitled "Public Aids to Transportation," written by Charles S. Morgan, Director, Coordinator's Section of Research, and this statement is found in volume 2, at page 200:

"The different State assessing bodies use different methods of valuation. Few, if any, State boards confine themselves to only one formula for valuation, the great majority using combinations of two or more. The better known formulas are so-called physical valuation, cost of reproduction new less depreciation, original cost, book value, gross receipts, market value of stocks and bonds, and capitalization of net income."

The author then defines each factor and the criticisms leveled against each, and then states:

"These criticisms are essentially sound, but they can be overcome in large measure by a valuation method which employs a combination of two or more formulae. Further, the operation of valuation methods is not confined to the bare outlines mentioned, but in some instance involves consideration of average income, stock and bond prices, or physical valuations over a period of years. Irregularities are thus to some extent ironed out."

Assuming the Petition charges over-assessment, such charge would not invalidate the assessment under the Equal Protection of the due process clause of the Fourteenth Amendment.

The Respondent states that the Petition alleges that it used the aforesaid factors in making the assessment, and the Respondent alleges that these factors are commonly used by Commissions and Courts as evidence of value and are required to be considered by the Arkansas statute, and the assessment it is alleged is produced by a composite [fol. 34] thereof, and these Respondents allege that such composite of the various factors as used by Commissions and Courts eliminates the error that would occur by the use of one or more of these factors as the sole evidence of value.

Therefore, these Respondents allege that the Petition does not state a subject for judicial review and fails to state a cause of action, and the Injunction was improvidently granted.

Wherefore, the Respondents pray the Injunction be dissolved and the Petition dismissed.

The Arkansas Corporation Commission, on Behalf of Itself and the County Collectors, by Jack Holt, Attorney General of the State of Arkansas, Leffell Gentry, Assistant Attorney General of the State of Arkansas. Hill, Fitzhugh & Brizzolara, Special Counsel.

IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN
DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

In the Matter of Missouri Pacific Railroad Company, Debtor

In the Matter of the Petition of the Trustee Relative to
Taxes for 1939 Assessed Against Property of the Trustee
in Arkansas

OPINION OF COURT ON OVERRULING OF MOTION OF ARKANSAS
CORPORATION COMMISSION TO DISMISS PETITION OF TRUSTEE
—Filed September 24, 1940.

This matter is now before the Court on a motion filed by the State of Arkansas to dismiss, on certain jurisdictional [fol. 35] grounds as hereafter more fully stated, a petition filed by Guy A. Thompson, Trustee, asking this Court to hear and determine the amount and validity of taxes assessed against the railroad properties of the Trustee in the State of Arkansas for the year 1939.

The petition as filed by the Trustee, on April 11, 1940, prayed for authority to pay or tender taxes to the Collectors of the several counties in said State, due in the year 1939, in the aggregate sum of \$620,645.03. As to the excess over that amount, or \$416,043.17, making up the total tax of \$1,036,668.20 resulting from the assessed value of \$28,050,000.00 set by the Arkansas Corporation Commission upon the Trustee's railroad properties in Arkansas for the year 1939 (upon which the taxes payable in 1940 are based) the petition prays that this Court hear and determine the amount and validity thereof.

The petition alleges that said assessed value of \$28,050,000.00 as set by the Arkansas Corporation Commission, is discriminatory, in violation of Section 5, of Article XVI of the Constitution of Arkansas; greatly in excess of

the fair market value of said properties, which the Arkansas statute provides shall be the basis for assessment, and would impose upon the Trustee so undue and disproportionate a share of the taxes in Arkansas as to deprive the Trustee of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Guy A. Thompson is the duly appointed, qualified and acting Trustee for the Missouri Pacific Railroad Company, following the adjudication of said Company, by this Court, as a debtor, under the provisions of Section 77 of the amended Bankruptcy Act, on March 30, 1933.

The Trustee appeals to this Court to hear and determine the amount and validity of the disputed tax, in accordance with the provisions of Section 64a of the Bankruptcy Act.

Following the filing of said petition, and upon the return day thereof (July 5, 1940) the State of Arkansas and the Corporation Commission, together with the several interested counties, appeared by the Attorney General for the State and filed a motion to dismiss Trustee's petition.

[fol. 36] The motion to dismiss is based upon the following grounds:

1st. That the order authorizing the Trustee to pay a certain part of the taxes, resulting from the assessment made by the Arkansas Corporation Commission and to withhold the balance pending the determination by this Court of the amount and validity of the disputed tax is in violation of Section 24 of the Judicial Code, as amended by the Act of May 4, 1934 (48 Stat. 775) which deprives United States District Courts of jurisdiction to enjoin, suspend or restrain the enforcement of any order of an administrative board of commission of a State, where jurisdiction is based solely upon the ground of diversity of citizenship or the repugnance of such order to the Constitution of the United States.

In the opinion of the Court this proceeding is not subject to the prohibition of Section 24 of the Judicial Code. This is not an injunction suit, nor is jurisdiction based solely upon diversity of citizenship or repugnance of the Commission's assessment to the Constitution of the United States. The Trustee invokes the jurisdiction of the Court to hear and determine the amount and validity of the disputed tax under the provisions of Section 64a of the Bank-

ruptcy Act. It is true that the petition alleged that the assessment is in violation of the 14th Amendment to the Constitution of the United States, but it also alleges that said assessment is in violation of the Constitution and of the Statutes of the State of Arkansas.

The Court is of the opinion that this ground of the State's motion to dismiss is without merit.

2nd. The second ground upon which the State relies in its motion to dismiss is that this Court is deprived of jurisdiction by the 1937 amendment to Section 24 of the Judicial Code (50 Stat. page 738) that:

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State."

[fol. 37] As has already been remarked, this is not an injunction suit, and, furthermore, the right of appeal to the State Courts does not afford an adequate remedy in such a case as is here presented.

This precise question was passed on by the Circuit Court of Appeals for this Circuit in Board of Directors of St. Francis Levee District vs. Kurn, 98 Fed. (2nd) 394, which involved the validity of certain Arkansas levee district taxes asserted against the Trustee of a railroad under reorganization. It was therein held the Act of August 21, 1937, did not deprive the Bankruptcy Court of jurisdiction to hear and determine the amount and validity of the disputed tax under the provision of Section 64a of the Bankruptcy Act, Certiorari was denied in the case last cited, by the Supreme Court, 305 U. S. 647.

In brief filed by the State in connection with its motion to dismiss effort is made to escape the force of the Court of Appeals decision in this St. Francis Levee District case upon the ground that the claims of the Levee District, involved in that case, were not "taxes". It will be observed, however, that throughout its opinion in that case the Court of Appeals referred to these claims as "taxes" and tax liens". And the Statute of Arkansas (Sec. 4465 Pope's Digest of Arkansas Statutes for 1937), which authorizes the assess-

ments against property in the district for the construction of levees, refers to these assessments as taxes.

It is true that in the present case there are not found the "numerous suits" to which the Court of Appeals refers in the St. Francis Levee District case as pending upon the levee taxes there involved. However, in the present case there exists tax liens upon the Trustee's property in some 50 counties in the State of Arkansas, based upon the assessment made by the Corporation Commission. This Court must ultimately pass on the validity of those liens and is expressly directed by Section 64a to order the payment of all taxes legally due. And the same section commits to the Bankruptcy Court the jurisdiction to hear and determine the validity of any tax asserted against the bankrupt estate which may be in dispute.

Section 64a, in substantially the same form as previously, was re-enacted by Congress in 1938 (52 Stat. page 874), in [fol. 38] the amendment of the original Act, presumably with full knowledge of numerous court decisions, previously handed down, holding that the Bankruptcy Court shall hear and determine the amount and validity of a disputed tax. This re-enactment of the Bankruptcy Act, with certain amendments not here material, was subsequent to the amendment of Section 24 of the Judicial Code by the Act of August 21, 1937, and it is not to be presumed that Congress would direct the Bankruptcy Courts to do what they were prohibited from doing in a previous Act.

The second ground of the State's motion to dismiss is likewise without merit.

3rd. The third reason asserted by the State in support of its motion to dismiss is that Section 64a of the Bankruptcy Act does not apply to taxes accruing after the Trustee acquired the property.

This precise ground for objection to the Court's jurisdiction was urged in the St. Francis Levee District case (*supra*). However, the Court of Appeals held therein that the Bankruptcy Court was the proper forum to hear and determine the amount and validity of taxes which in that case, as here, accrued after the Trustee acquired title to the property.

This Court is concluded by the decision of the Court of Appeals for this Circuit upon this question, and this ground must likewise be ruled against the State.

4th. The fourth reason urged by the State in support of its motion to dismiss is that Section 64a of the Bankruptcy Act is no part of Section 77.

This ground must likewise be ruled against the State upon the authority of the decisions of the Court of Appeals for this Circuit in the two St. Francis Levee District cases, 91 Fed. (2nd) 118 and 98 Fed. (2nd) 394. Those cases involved taxes asserted against a railroad in reorganization under Section 77, and the Court of Appeals specifically held that, by reason of the provisions of Section 64a, the Bankruptcy Court in which the reorganization was pending was vested with jurisdiction to hear and determine the amount and validity of the disputed tax.

[fol. 39] 5th. The fifth ground urged by the State of dismissal is that the Trustee failed to exhaust his administrative remedies before filing his petition in this Court.

So far as concerns the proceedings before the Arkansas Corporation Commission, the Court is of the opinion that paragraph 5 of the Trustee's petition alleges compliance with all of the requirements of Sections 2041, 2047 and 2050 of the Arkansas Statutes (Pope's Digest for 1937).

It is admitted that no appeal was taken from the action of the Corporation Commission to the State Courts, as is permitted by the Statutes of Arkansas. However, the fact that a right of appeal to the State courts was granted by the Statute does not deprive this Court of jurisdiction to hear and determine the amount and validity of the disputed tax under the express mandate of Section 64a of the Bankruptcy Act.

6. The sixth ground urged by the state for dismissal is that the Trustee had a plain, speedy and efficient remedy by appeal to the Pulaski Circuit Court and thence to the Supreme Court of Arkansas.

The court is of the opinion that this right of appeal granted by the Arkansas Statutes does not preclude the Trustee from petitioning this court to determine the amount and validity of the disputed tax under the provisions of Section 64a of the Bankruptcy Act.

7. The seventh ground urged by the State for dismissal is that the petition of the Trustee does not state a justifiable controversy.

The Court is of the opinion that the averments of the Trustee's petition present a justifiable controversy.

The Motion of the State to dismiss Trustee's petition herein will be overruled. Appropriate order will be entered.

Geo. H. Moore, United States District Judge.

[fol. 40] IN UNITED STATES DISTRICT COURT

(Title omitted)

ORDER OVERRULING MOTION OF ARKANSAS CORPORATION COMMISSION TO DISMISS PETITION OF TRUSTEE—Filed September 24, 1940

Now on this day the Court having fully considered the motion heretofore filed herein by the State of Arkansas to dismiss the petition filed in this proceeding by Guy A. Thompson, Trustee, together with briefs filed upon said motion by counsel for the State of Arkansas and by counsel for said Trustee and oral arguments upon said motion heretofore presented to the Court; and being fully advised in the premises, said motion to dismiss said petition is hereby overruled.

Geo. H. Moore, Judge.

IN UNITED STATES DISTRICT COURT

DESIGNATION OF MATTERS TO BE INCLUDED IN RECORD ON APPEAL—Filed September 24, 1940

Come the appellants, the defendants in the above entitled action—the Arkansas Corporation Commission, the members thereof and fifty-one (51) County Collectors of taxes and designate the following portions of the record and proceedings intended to be a complete record of the proceedings herein, to-wit:

1. Petition No. 1475 of the Trustee Relative to Taxes for 1939 Assessed Property of the Trustee in Arkansas filed herein April 11th, 1940.

2. Order of the Court of April 11th, 1940 entered upon the application in said Petition ordering the Trustee to [fols. 41-42] withhold and refrain from paying to the Collectors of taxes in fifty-one Counties in Arkansas the sum alleged to be in controversy in said Petition, amounting to \$416,043.17, alleged as an excessive assessment levied against the Trustee's property.

3. Motion to Dissolve the Injunction and Dismiss the Petition filed by said defendants on July 5th, 1940.

4. Order of the Court overruling said Motion, entered on the day of, 1940.

5. Opinion of the Court filed on the overruling of said Motion.

This Designation is intended to call for a complete record of all proceedings relating to the Petition and Order thereupon, and Motion to Dissolve and the Order overruling the same, which is appealed from.

Jack Holt, Attorney General. Lefel Gentry, Assistant Attorney General. Hill, Fitzhugh & Brizzolara, Special Counsel for the State. Attorneys for Arkansas Corporation Commission, the members thereof and the aforesaid 51 County Collectors of taxes referred to.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 43] Appearances of counsel omitted in printing.

[fol. 44] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

ORDER OF SUBMISSION—November 22, 1940

This cause having been called for hearing in its regular order, argument was commenced by Mr. Joseph M. Hill for appellants, continued by Mr. James M. Chaney for appellee and concluded by Mr. Joseph M. Hill for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, with leave to appellants to file a reply brief.

[fol. 45] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1940

No. 11,864.

ARKANSAS CORPORATION COMMISSION, the Members Thereof,
and Fifty-One County Collectors of Taxes, Appellants,

vs.

GUY A. THOMPSON, as Trustee of Missouri Pacific Railroad
Company, Debtor, Appellee

Appeal from the District Court of the United States for
the Eastern District of Missouri

Mr. Joseph M. Hill (Mr. Jack Holt, Attorney-General for
the State of Arkansas, Mr. Leffel Gentry, Assistant Attor-
ney General for the State of Arkansas, and Messrs. Hill,
Fitzhugh & Brizzolara were with him on the brief) for
Appellants.

Mr. James M. Chaney (Mr. Harvey G. Combs was with
him on the brief) for Appellee.

Before Gardner, Woodrough and Johnson, Circuit Judges

[fol. 46]

OPINION—DECEMBER 26, 1940

PER CURIAM:

The Missouri Pacific Railroad Company is the debtor
in proceedings under Section 77 of the Bankruptcy Act
for the reorganization of a railroad pending in the fed-
eral district court in Missouri, and has extensive prop-
erties in Arkansas. Its trustee filed a petition in the dis-
trict court in the reorganization proceedings on April 11,
1940, in which it was alleged that the Arkansas Corpora-
tion Commission, charged with the duty of assessing the
railroad's property in the state for taxation, had assessed
the same at the sum of \$28,050,000 for the year 1939; that
said assessed value is discriminatory, in violation of Sec-
tion 5 of Article XVI of the Constitution of Arkansas;
greatly in excess of the fair market value of said prop-
erties which the Arkansas statute provides shall be the
basis for assessment, and would impose upon the trustee
such an undue and disproportionate share of the taxes in
Arkansas as to deprive the trustee of his property without

due process of law and the equal protection of the laws, in violation of the federal constitution. The trustee alleged that by section 64 of the Federal Bankruptcy Act, as amended June 22, 1938 (11 U.S.C.A., Sec. 104 a [4]), it is provided that this court shall make no order for the payment of a tax assessed against the property of the trust estate in excess of the value of the debtor's interest therein as determined by the court, "and provided further that in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court." The petitioner prayed that the court hear and determine the amount and legality of the taxes assessed for the year 1939 against the property of the trustee in Arkansas, and that pending the determination by the court of the amount and legality of the taxes assessed, that the trustee be authorized to pay or tender payment in the aggregate sum of \$620,645.03 (about sixty per cent) and [fol. 47] to withhold any further taxes based upon the assessment until the further order of the court. On presentation of the trustee's petition, the court entered its order that the petition be set for hearing on a date certain and that the trustee should give notice of the hearing by sending notice to all parties who customarily receive printed copies of the record in the proceeding, and to the Attorney General of Arkansas, each member of the Arkansas Corporation Commission and each of the county collectors of the several counties in which taxes have been levied against the property of the trustee for the year 1939. It was also ordered that the trustee be authorized to pay or to tender payment to the several collectors of the counties in the aggregate amount of \$620,645.03, based upon the maximum proper assessment of said properties as conceded by the trustee, and to withhold until the further order of the court any additional taxes for the year 1939 based on the assessment made, pending the determination by the court of the amount and legality of the taxes so assessed.

The Arkansas Corporation Commission appeared on behalf of itself and the fifty-one tax collectors and presented a motion in writing that the petition of the trustee of April 11, 1940, be dismissed, and that the order entered upon the petition be in all respects dissolved. A hearing was had upon the motion and it was overruled. In an opinion accompanying its ruling on the motion, and its order, the court stated its conclusion that the petition of

the trustee was sufficient in law and presented a controversy within the court's jurisdiction in bankruptcy, and that section 64a of the Bankruptcy Act of 1938 "commits to the bankruptcy court the jurisdiction to hear and determine the validity of any tax asserted against the bankrupt estate which may be in dispute", and that none of the grounds presented in the motion justified dismissal of the trustee's petition or dissolution of the order made re-[fol. 48] specting the amount of the taxes to be paid or tendered to be paid by the trustee pending determination of the amount and validity of the disputed tax.

From this interlocutory order denying the motion the Arkansas Corporation Commission and its members and the fifty-one county collectors of taxes have appealed. They contend, as they did in the court below:

(1) That section 64a of the Bankruptcy Act of 1938 is not a part of Section 77 (covering railroad reorganization); (2) that said section 64a is applicable only to taxes which have accrued against a bankrupt prior to bankruptcy; (3) that the court's order authorizing the trustee to pay or tender to be paid a part only of the tax assessed in Arkansas is in effect an order of injunction against the payment of a tax and is violative of 28 U. S. C. A. 41, in that the laws of Arkansas afford the trustee a plain, speedy and adequate remedy, and (4) that the trustee's petition does not state facts sufficient to justify any judicial relief against the tax assessment complained of.

In limine the trustee has presented that this court should decline to entertain this appeal as the order appealed from is in a proceeding in bankruptcy and is manifestly interlocutory and is not conclusive of the merits of the controversy between the trustee and the Arkansas tax authorities. But we conclude that the appeal is authorized by the provisions of Section 24a, b, of the Bankruptcy Act as amended June 22, 1938 (52 Stat. 854-855) and decline to dismiss it.

(1) The question whether the provisions of 64a of the Bankruptcy Act were applicable in proceedings under Section 77 of the Act was necessarily involved in our decisions in *St. Francis Levee District v. Kurn*, 91 F. 2d 118 (cert. den. 302 U. S. 750) and *St. Francis Levee District v. Kurn*, 98 F.2d 394 (cert. den. 305 U. S. 647). Each of those cases [fol. 49] involved a railroad reorganization under Section

77 and in each of them the jurisdiction of the bankruptcy court was invoked by the railroad trustees and relief against taxes assessed pursuant to state authority was sought under the provisions of Section 64a. We held that the power conferred upon the bankruptcy court by that section to hear and determine the amount and validity of disputed taxes was applicable in proceedings for reorganization of a railroad under Section 77, and our mandate directed the bankruptcy court to proceed to hearing and determination of the validity and amount of the taxes in the cases in which the appeals were taken.

We did not reach our conclusion without full appreciation of the very great burden of responsibility that section 64a may impose upon the bankruptcy court in railroad reorganization proceedings, and we were not unmindful that during the period of railroad reorganization the several states through which the debtor railroads run may be temporarily restricted in the exercise of their general and customary sovereign powers in respect to the collection of taxes assessed against property within their borders. The relevant considerations on behalf of the state are ably developed in the brief of appellants and additional citations filed after oral argument.* But we decline to recede from our decisions rendered in the St. Francis Levee District cases. The reorganization of the debtor railroads in bankruptcy can not be regarded as a matter of merely local concern of some one state through which the roads may run. "The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law." *Kalb v. Feuerstein*, 308 U. S. 433-439. It is vitally necessary that the bankruptcy court [fol. 50] to which the reorganization of the railroad debtor herein has been confided by section 77 of the Act should be empowered to determine the validity and amount of all liens against the railroad property and to marshal them in order to accomplish the purpose of the reorganization proceedings. Section 64a confers such power in respect to taxes. *St. Francis Levee District cases*, *supra*; *Ex parte Baldwin*,

*Yale Law Journal, Vol. 50, p. 165, November, 1940; Transport Topics, December 2, 1940, p. 12.

291 U. S. 610; *Isaac v. Hobbs Tie & Lumber Co.* 282 U. S. 734; *Henderson County v. Wilkins*, 4 Cir., 43 F. 2d 670. See *New York v. Irving Trust Company*, 288 U. S. 329.

(2) As to the contention that Section 64a is applicable only to taxes which have accrued against the railroad debtor prior to the institution of proceedings under Section 77. The relevant wording of 64a as it appears in the 1938 amendment is "in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court" (meaning the bankruptcy court), and we discern no reason to hold that the words "any taxes" should be restricted as contended for. The amendment of the Bankruptcy Act of June 22, 1938, does not change the classification of taxes accruing during the trustee's possession as part of the cost and expenses of administration which are subject to the determination of the bankruptcy court. As the court must pass upon them for the purpose of allowance or disallowance, it is necessary that it should have the power to hear and determine their amount and legality. The contention is overruled.

(3) We are not persuaded that the preliminary order of the bankruptcy court directing the trustee to pay or to tender to pay a part of the taxes in dispute, and to withhold payment of the balance pending determination of the amount and legality of the taxes assessed, was an order of injunction within the meaning of 28 U. S. C. A. 41, and a fortiori we decline to hold that the order was in any [fol. 51] of its terms violative of that section. The provision relied on by appellants is as follows:

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reason-

able notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. (As amended May 14, 1934, c. 283, Sec. 1, 48 Stat. 775; Aug. 21, 1937, c. 726, Sec. 1, 50 Stat. 738.)"

We think it very plainly appears on the face of the provision that it has no relation to the administration of estates under the bankruptcy act. There is no express repeal of section 64a of the bankruptcy act and we find no indication of any intent to effect such repeal by implication. Whether or not there are state laws under which the trustee in bankruptcy might obtain a determination by the state courts of the amount or validity of the disputed state taxes allowable as liens and as part of the cost and expense of administration in bankruptcy is immaterial. The power to make the determination has been expressly conferred upon the bankruptcy court by special provision which is an integral part [fol. 52] of the plan of bankruptcy administration of the property brought within its exclusive jurisdiction. A withdrawal of the power so expressly conferred may not be inferred from the general provisions of 28 U. S. C. A. 41, which were obviously intended to apply to and prevent injunction suits to enjoin taxes such as had commonly been maintained in the district courts in the exercise of their general equity jurisdiction.

(4) Much of the brief of appellants is in support of attack in the nature of demurrer to the petition of the trustee on the ground that the petition does not state facts sufficient to justify judicial relief against the tax assessment complained of. Examination of the petition discloses charges made by the trustee that the action of the Arkansas Corporation Commission in increasing the assessment of the trustee's property was illegal, unconstitutional and invalid because (1) disproportionate consideration was given to certain elements of value; (2) consideration was given to an irrelevant element; (3) proper elements were not considered; (4) that the assessment was wrongfully discriminatory against the trustee and in favor of other property in

Arkansas in violation of Section 5 of Article XVI of the Constitution of Arkansas, and that there was discrimination amounting to constructive fraud depriving the trustee of his property with due process and in denial of the equal protection clause, contrary to the federal constitution. We can not say that the petition is so entirely lacking in averment of facts that it does not raise a question as to the amount and legality of the taxes within the meaning of Section 64a, or that this court would be justified in reversing the interlocutory order refusing to dismiss it. By its recent decision in *N. C. & St. L. Ry. v. Browning*, 310 U. S. 362, the Supreme Court has clarified the law applicable to the trustee's claims under the due process and equal protection clauses of the federal constitution, and whether any invalidity has resulted as charged, from violation of the constitution or statutes of the state, must be determined in strict conformity to the state decisions. The bankruptcy court is in position to require the parties to proceed promptly to final hearing of whatever issues are presented and to determine the amount and legality of the taxes, and we hold that it is fully empowered and required to do so. The interlocutory order appealed from is

Affirmed.

[fol. 54] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 11864

ARKANSAS CORPORATION COMMISSION, the members thereof
and fifty-one (51) County Collectors of Taxes, Appellants,

vs.

GUY A. THOMPSON, as Trustee of Missouri Pacific Railroad
Company, Debtor

Appeal from the District Court of the United States for the
Eastern District of Missouri

JUDGMENT—January 3, 1941

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

Upon Consideration Whereof, It is now here Ordered and Adjudged by this Court that the interlocutory order of

the said District Court appealed from in this cause be, and the same is hereby, affirmed with costs; and that Guy A. Thompson, as Trustee of Missouri Pacific Railroad Company, Debtor, have and recover against the appellants the sum of Twenty Dollars for his costs herein and have execution therefor.

[fol. 55] IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR STAY OF MANDATE—Filed January 8, 1941

Come the appellants herein and state to the court that they have ordered and paid for a transcript of the record of the proceedings in this Court, to be presented to the Supreme Court of the United States, with a petition for writ of certiorari to review the order of this Court entered herein on January 3, 1941. The appellants further allege that they are preparing the petition and will have it printed as soon as possible and file with said record in the Supreme Court of the United States.

Wherefore, your petitioners pray that an order be made staying the issuance of a mandate herein until the Supreme Court of the United States passes upon said petition, and if it grants it to stay the issuance of mandate until the case deferred therein.

Arkansas Corporation Commission, et al., Appellants. By Jack Holt, Attorney General. Leffel Gentry, Assistant Attorney General. Joseph M. Hill, Henry L. Fitzhugh and John Brizzolara, Special Counsel.

[File endorsement omitted.]

[fol. 56] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—January 10, 1941

On Consideration of the motion of appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the

Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 57] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 3, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,064. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 715. The Arkansas Corporation Commission, and Fifty-One County Tax Collectors of Arkansas, Petitioners, vs. Guy A. Thompson, as Trustee of Missouri Pacific Railroad Company, Debtor. Petition for a writ of certiorari and exhibit thereto. Filed January 23, 1941. Term No. 715 O. T. 1940.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 715

**THE ARKANSAS CORPORATION COMMISSION AND
FIFTY-ONE COUNTY TAX COLLECTORS OF
ARKANSAS,**

Petitioners,

vs.

**GUY A. THOMPSON, AS TRUSTEE OF MISSOURI PACIFIC
RAILROAD COMPANY, DEBTOR.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

✓ **JACK HOLT,**

Attorney General of Arkansas;

✓ **LEFFEL GENTRY,**

Assistant Attorney General;

✓ **HENRY L. FITZHUGH,**

✓ **JOSEPH M. HILL,**

Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 715

**THE ARKANSAS CORPORATION COMMISSION AND
FIFTY-ONE COUNTY TAX COLLECTORS OF
ARKANSAS,**

vs.

Petitioners,

**GUY A. THOMPSON, AS TRUSTEE OF MISSOURI PACIFIC
RAILROAD COMPANY, DEBTOR.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

*To the Honorable Charles Evans Hughes, Chief Justice of
the United States, and the Associate Justices of the Su-
preme Court of the United States:*

The petitioners are the members of the Arkansas Corporation Commission and the tax collectors of fifty-one counties of the State of Arkansas, and they respectfully submit the following matters:

Summary Statement of the Case.

The Missouri Pacific Railroad Company is in bankruptcy in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, at St. Louis, in a Corporate Reorganization Proceedings under Section 77 of the Bankruptcy Act. The Trustee, under orders of Court, operates the railroad in fifty-one (51) counties in Arkansas. On April 11, 1940, the Trustee filed in said District Court a Petition relative to the taxes for 1939, assessed against property of the Trustee in Arkansas. Mindful of the mandate for a short summary, yet it is necessary to give the structure of this petition filed by the Trustee (R. 6 to 20), since the Circuit Court of Appeals held his allegations were sufficient to give the District Court in Bankruptcy jurisdiction to determine the amount of the assessments levied against the property. Hence the bare bones thereof are summarized.

The Petition alleged that the Trustee was under order of Court authorized to pay taxes on property of the debtor for which the debtor or Trustee was obligated by law to pay; that questions had arisen with respect to the legality and amount of the general taxes assessed and levied for the year 1939 against property of the trust estate then owned and operated by the Trustee; that jurisdiction was given the Bankruptcy Court under Section 64 (a), paragraph 4, of the General Bankruptcy Act of 1938, to determine the question of legality and amount of the taxes. The Petition, however, does not correctly state the terms of said section and paragraph. The section relates only to taxes of the bankrupt prior to the bankruptcy proceeding and establishes the priority of such debts when ascertained.

The Petition alleged some of the provisions of the Arkansas Statutes for assessing railroad operating property and

for the levy and collection of taxes thereupon. They provide in substance that the power and duty of assessment be vested in a State Board designated as the Arkansas Corporation Commission which is required to consider what a clear fee simple title would sell for under usual conditions of sale of such character of property; and further to consider, in so far as other evidence and information in its possession does not make it improper or unjust to do so, the market or actual value of its outstanding capital stock and funded debt and income.

The Petition did not allege, but the Statute, Section 2044, Pope's Digest, requires the Commission to consider the estimated investment and valuation of the property as set up in the Company's books as the basis for adjustment of rates or charges for services, and such other information as to value the Commission may obtain. The Petition alleged that the value determined by the Commission was required to be certified and apportioned to the counties for the levy and collection of taxes upon such assessed valuation as are levied and collected upon property of local owners. The Petition alleged the companies were required to make returns of their property and valuation and income, etc., and that those were duly made; and that thereafter the Commission was required to assess the property. The Petition alleged that the Trustee was given notice of the impending assessment and that he appeared and protested the tentative amount thereof, and a final hearing was set for December 4, 1939, and after said hearing the final assessment was made of the Trustee's property in Arkansas in the sum of \$28,050,000; and that on December 5, distribution and apportionment was made of the amount to the several counties as required by law and that the taxes were levied in such counties in the amounts set forth in the Petition, and that warrants for the collection thereof were in

the hands of the local tax collectors at the time the Petition was filed.

The Petition alleged that this assessment was based on a system value of \$247,565,396; and that there was allocated to Arkansas 28.39411 per cent of this amount, and after said allocation to Arkansas an equalizing factor of 40% was applied thereto, resulting in the aforesaid assessment of \$28,050,000. Neither the allocation or equalization factor is assailed, and further reference to them is unnecessary.

The Petition alleged the System value was arrived at by a composite average of various factors in which 25 per cent consideration was given to the stock and bond values for a five year period preceding the assessment; 25 per cent consideration to capitalization of earnings at the rate of 6% per annum for said period; 25% consideration to reproduction cost less depreciation as found by the I. C. C.; 12½ per cent consideration to book value as carried on the books of the Railroad Company, and 12½ per cent consideration to the gross income for the five year period.

The Petition did not assail use of the stock and bond factor and the capitalization of earning factor, on the contrary alleged they were proper factors upon which to make the assessment without considering other factors, and that the consideration of those other factors, reproduction costs less depreciation, book values, and gross income, resulted in establishing an over assessment of the Trustee's property, which was discriminatory under the Arkansas Constitution, and in violation of the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The Petition alleged that the use of the proper factors would have resulted in an assessment of the Trustee's property in the sum of \$16,830,000, and set up an apportionment thereof to the counties. This table showed a difference in

taxes when computed on the assessment made by the Commission and the assessment which the Trustee alleged should have been made in the amount of \$416,043.17.

The Petition failed to allege the Arkansas statutory remedy for a tax payer having such grievance as alleged by the Trustee which is provided in Sections 2019-2020 of Pope's Digest. These sections provide for an appeal from the final Order of the Commission to Pulaski Circuit Court, a Court of general jurisdiction at the seat of Government, and provide for temporary or other proper relief, pending the hearing, and for the advancement of the cause to a speedy hearing; and further provide for an appeal to the Supreme Court by an aggrieved party with like requirements for advancement of the cause upon the docket. The Supreme Court of Arkansas has held this to be a judicial review of the action of an administrative body. *Clearcreek Oil & Gas Co. v. Spelter Co.*, 161 Ark. 12. Instead of pursuing this remedy the Trustee prayed in his Petition that he be authorized to pay the taxes which he set up therein should be paid, and that he be authorized to refrain from paying to the collectors the taxes which he disputed, amounting to \$416,043.17, until the court heard and determined the amount and legality thereof. Upon the filing of the Petition the Court ordered the Trustee to pay the taxes to the collectors according to the prayer of the Trustee in his Petition, and "to withhold and refrain from paying the collectors of said respective counties, any additional taxes for the year 1939, based on the assessment heretofore made upon the properties of the Trustee in said State by the Corporation Commission of the State of Arkansas, pending determination by this Court of the amount and legality of the taxes assessed against the property of the Trustee in said respective counties for the year 1939" (R. 25).

The Petition was set for hearing at a date certain, and notice of the same and a copy of the aforesaid order was

directed to be sent to the Attorney General of Arkansas, the Corporation Commission of Arkansas, and the Fifty-one County Collectors holding the warrants for the collection of the taxes (R. 21). The Attorney General, the Corporation Commission and the fifty-one Collectors filed a Petition to Dissolve the Injunction and Dismiss the Petition (R. 25-34), upon the following grounds:

- (1) That the assessment was an Order of a Board of the State where reasonable notice was given and full hearing had and where a plain, speedy and efficient remedy was available to the Petitioner for the matters and things alleged in said petition, which remedy was provided in Sections 2019-2020, Pope's Digest.
- (2) That the assessment made by the Corporation Commission was the basis for a tax imposed by and pursuant to the laws of the State, and taxes accruing in each county as set forth in the petition were taxes imposed by the laws of the State; and similar allegations were made as to the plain, speedy and efficient remedy provided by the Statutes of Arkansas.
- (3) That the petition was based on an assumed authority given the District Court in Bankruptcy, under Section 64a of the Bankruptcy Act of 1938, and the Commission alleged said provision established priority in debts of a bankrupt estate in liquidation, and if applicable to taxes cceedings under Section 77, was only applicable to taxes due by the bankrupt estate prior to bankruptcy, and not to taxes accruing during the operation of the property by the Trustee under the order of the Bankruptcy Court. The Commission further alleged that under Chapter IV, Section 23b of the Bankruptcy Act of 1938, the Trustee could only prosecute his suit in a court where the bankrupt could have done so had not bankruptcy intervened.

(4) The Commission alleged that Section 64a of the Bankruptcy Act was inconsistent with the preceding Section 77a and was not applicable to proceeding under Section 77.

(5) The fifth point was not pressed in the court below and the sixth point now becomes the fifth, and is that the petition did not present a justifiable controversy. The petition showed that the attack on the assessment raised purely an administrative question as to the proper weight to be attached to various recognized factors, and did not raise a question for court review.

For each of the aforesaid reasons the Commission prayed that the injunction against the collection of the taxes on the property of the Trustee be dissolved and the petition of the Trustee be dismissed.

The District Court overruled said motion, holding it had jurisdiction under 64a, notwithstanding the appeal was not taken to the courts in Arkansas, which right was given to the Trustee by the Arkansas Statutes (R. 39). These petitioners appealed to the Circuit Court of Appeals and it affirmed the decision of the District Court.

**Statement of Basis of Jurisdiction of This Court to Review
the Decree of the Court Below.**

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code (28 U. S. C. A., Section 347).

The date of the decree to be reviewed is January 3, 1941; and the opinion of the Circuit Court of Appeals pursuant to which said decree was entered on said date is attached to the printed record to be furnished with this application for writ of certiorari.

Statement of the Questions Presented.

(1) Whether the power conferred on courts of bankruptcy by Section 64a (11 U. S. C. A. 104) applies only to taxes which are "due and owing by the bankrupt," or whether such power also applies to taxes which accrue during the pendency of the proceedings which are payable as a part of the expense of administering the estate.

(2) Whether Section 64a (11 U. S. C. A. 104) is a part of Section 77 so as to be applicable to a railroad reorganization proceeding.

(3) Whether Section 24 of the Judicial Code as amended (28 U. S. C. A. 41) denying to district courts jurisdiction of any suit to enjoin, suspend or restrain the enforcement of any order of State administrative board, and denying to district courts jurisdiction of any suit to enjoin or restrain the assessment, levy or collection of any tax imposed by the laws of any State, where a plain, speedy and efficient remedy may be had in the courts of such State, is applicable to a district court acting under Section 77 of the Bankruptcy Act in the matter of a railroad reorganization proceeding.

(4) The petition of the Trustee in the district court showed on its face a non-justiciable controversy in that it presents questions delegated exclusively to an administrative body.

Statement of Reasons Relied on for the Allowance of the Writ.

1.

The decision of the Circuit Court of Appeals is upon important questions of Federal law, none of which has

been directly passed upon by this Court. The questions are frequent in railroad reorganization proceedings and the decision of this Court on these questions is important in order that consummation of the proceedings shall not be further delayed and that the relative rights of the States and the bankruptcy courts in regard to taxation be determined.

2.

The decision of the court below is in conflict with principles established by prior decisions of this Court.

The gravity and scope of the decision is indicated by the following statement in the opinion of the court below:

"We did not reach our conclusion without full appreciation of the very great burden of responsibility that Section 64a may impose upon the bankruptcy court in railroad reorganization proceedings, and we are not unmindful that during the period of railroad reorganization the several states through which the debtor railroads run may be temporarily restricted in the exercise of their general and customary sovereign powers in respect to the collection of taxes assessed against property within their borders."

The cases referred to which in principle are contrary to the decision herein are: *Palmer v. Mass.*, 308 U. S. 79; *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U. S. 134; *Nashville, Chattanooga, etc., R. R. v. Browning*, decided May 20, 1940, not yet officially reported, *Advance Opinions*, 310 U. S. 362; *Railroad Commission v. Rowan & Nichols Oil Company*, decided June 3, 1940, not yet officially reported, *Advance Opinions*, 310 U. S. 573.

This decision is also in conflict in principle with *Bordes v. First National Bank*, 178 U. S. 524, construing what is now Chapter IV, Section 23b, of the Bankruptcy Act which

requires the Trustee to bring suit only in such courts which the bankrupt could have sued if bankruptcy proceedings had not been instituted.

3.

It is submitted that this decision has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision.

The effect of this decision rendered inapplicable to district courts sitting in bankruptcy (in Section 77 proceedings) the following Acts of Congress: (a) The Johnson Act of 1934, and (b) the Tax Act of 1937, which are amendments to Section 24 of the Judicial Code and are now compiled in U. S. C. A., Title 28, Section 41. The first of these forbids the District Courts issuing injunctions against orders of State Boards where the State courts afford plain, speedy and efficient remedies, and the second one forbids injunctions against the assessment, levy or collection of taxes imposed by the laws of the State, where the State affords such plain, speedy and efficient remedies; and (c) Chapter IV, Section 23b of the Bankruptcy Act requiring the trustee to bring suit only where the bankrupt could have sued.

In note 17, appended to *Palmer v. Mass.*, 308 U. S. 79, is this statement:

"Congress did not intend that those who operate a business under the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power."

This decision is also subversive of a sound principle which has been stated and applied by the Eighth Circuit Court of Appeals, heretofore, to-wit:

"When a state provides a tribunal for the hearing of complaints against assessment, such tribunal has exclusive jurisdiction."

McLaughlin v. St. Louis & Southwestern Ry., 232 Fed. 579;

Missouri Pacific Railroad Company v. Conway and Vilonia Road District, 280 Fed. 401.

This decision is in conflict with decisions of other Circuit Courts of Appeal on the same matter. This opinion holds 64a is applicable to taxes levied against the trustee and is not confined to taxes due by the bankrupt prior to bankruptcy proceedings. The following decisions hereinafter referred to were rendered under 77b, which, in this respect, differs from 77 only that in the former there is a provision that if and when corporate reorganization fails and liquidation is ordered then 64a becomes applicable, whereas under 77 there can never be liquidation as dismissal is required when reorganization fails.

The Circuit Court of Appeals of the Fifth Circuit in *Robertson v. Goree*, 29 F. (2d) 261, and the Second Circuit Court of Appeals in *McGregor v. Johnson-Cowdin, etc.*, 39 F. (2d) 574, each held that the trustee's taxes were included in the necessary cost of preserving the estate, subsequent to filing the petition and were not the taxes of the bankrupt which were controlled by 64a. The Circuit Court of Appeals of the Eighth Circuit in *Hennepin County v. Savage*, 83 F. (2d) 453, held these decisions reasonable and followed and applied them until this decision, when they now take the opposite view thereof. (The decision of this Court in *Boteler v. Ingels*, 308 U. S. 51, which distinguishes between tax penalties of the bankrupt and tax penalties of the trustee, indicates that the former decision and not the present one of the said Court of Appeals of the Eighth Circuit was the correct one.)

The opinion of the court below holds that 64a is a part of Section 77, while the Circuit Courts of Appeals of the First, Fifth and Seventh Circuits have held, in cases arising in 77b which so far as this point is concerned is analogous with Section 77, that 64a is inconsistent with other provisions of the Section and hence 64a could not be applicable thereto. The decisions so holding are as follows:

Texas Co. v. Blue Way Lines, 93 F. (2d) 595, Circuit Court of Appeals of the First Circuit; *City of Springfield v. Hotel Charles Co.*, 84 F. (2d) 589, Circuit Court of Appeals of the First Circuit; *Florida National Bank v. United States*, 87 F. (2d) 896, Circuit Court of Appeals of the Fifth Circuit; *168 Adams Bldg. Corp.*, 105 F. (2d) 704, Circuit Court of Appeals of the Seventh Circuit.

The decision of the Circuit Court of Appeals of the Third Circuit, rendered November 25, 1940, in *Central Railroad Company of New Jersey v. Martin*, not officially reported, while arising differently, is in conflict with the essentials of this decision, whose review we are now asking.

5.

This opinion decides important questions of local law in a way conflicting with local applicable decisions. The opinion states that the petition alleged "That the assessment was wrongfully discriminatory against the Trustee in favor of other property in Arkansas, in violation of Section 5, Article 16, of the Constitution of Arkansas" (R. 18). This is a mere general statement without alleging any specific facts constituting the discrimination and is not sufficient to sustain a charge of discrimination and it is a mere conclusion of law. *Rogers v. Rogers*, 174 Ark. 486.

The soundness of this proposition is declared by similar decisions of this Court. See *Bordens Farm Products Co. v. Baldwin*, 293 U. S. 194. However, it is purely a question of

the Arkansas law as to what would be a good cause of action charging a violation of a provision of the Arkansas Constitution. The only other ground for relief in the trustee's petition was the alleged violation of the due process clause of the Fourteenth Amendment and that is rendered untenable by *Nashville, Chattanooga, etc., R. R. Co. v. Browning*, decided May 20, 1940, not officially reported, Advance Opinions, 310 U. S. 362.

Again the opinion in this case holds that the order directing the trustee to withhold and refrain from paying the disputed taxes, which it was his duty to pay unless the court relieved him by an injunctive order from so doing, was not an injunction. The Supreme Court of Arkansas in *Gainesburg v. Dodge*, 193 Ark. 473, defined an injunction differently from the court below. The Court's view that this order was not an injunction is certainly unsound if the Arkansas rule is applied, and equally so if the Federal rule is applied, which is announced in *Enelow v. N. Y. Life Ins. Co.*, 293 U. S. 379.

For each of these reasons it is respectfully prayed that the writ of certiorari be granted.

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Attorney General of Arkansas;
 LEFFEL GENTRY,
Assistant Attorney General;
 HENRY L. FITZHUGH,
 JOSEPH M. HILL,
Counsel for Petitioners.

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CLERK

IN THE

Supreme Court of the United States

THE ARKANSAS CORPORATION COMMISSION, and Fifty-One County Tax Collectors of Arkansas-----**Petitioners and Appellants Below**

Vs.

GUY A. THOMPSON, as Trustee of Missouri Pacific Railroad Company,
Debtor-----**Respondent and Appellant Below**

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

✓ **JACK HOLT,**
Attorney General of Arkansas.

/ **LEFFEL GENTRY,**
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✓ **HENRY L. FITZHUGH,**
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Counsel for Petitioners.

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—4—

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The questions discussed in the opinion of the Circuit Court of Appeals will be presented in their order.

1.

THE ST. FRANCIS LEVEE DISTRICT CASES

The opinion is based primarily on the earlier decisions of that court in the St. Francis Levee District cases, the first of which was St. Francis Levee District v. Kurn, 91 Fed. (2) 118 and the last St. Francis Levee District v. Kurn, 98 Fed. (2) 394. It is of no interest now whether these cases were correctly decided or not. They are not a proper basis for this decision.

The first case was an appeal from an interlocutory injunction granted by the United States District Court for the Eastern District of Arkansas in a suit therein brought by the Trustee against the District which involved foreclosure suits brought by the District against the Trustee. The second was an appeal from an order of the Bankruptcy Court in St. Louis requiring the district to file its claims therein on or before a specified date or be barred and enjoining other foreclosure suits which had been brought since the first suit. These suits did not involve any actions of the State Board nor any taxes imposed by the State or its political subdivisions. The court held in these cases that the District was not a civil or political agency of the State, that it was a mere quasi public corporation like a railroad. There was no statutory remedy for a judicial review of the assessments made by the Board, the only provision was for an administrative review which was discussed fully by the court in St. Francis Levee District v. the Frisco Railroad, 74 Fed. (2), 186.

The District Court in this case followed these cases as binding upon it, and an interesting article reviewing the decision of the District Court is found in the Yale Law Journal of the November 1940 issue, entitled: "Jurisdiction of a Federal Bankruptcy Court to Rule on State Taxes." Furthermore, these cases were decided before this court rendered its decisions in the cases of *Palmer v. Massachusetts*, 308 U. S. 79, *Railroad Commission v. Rowan and Nichols Oil Company*, 310 U. S. 573, and *Nashville and Chattanooga, etc., Railroad v. Browning*, 310 U. S. 362.

2.

POWERS OF BANKRUPTCY COURT

In *Palmer v. Massachusetts*, 308 U. S. 79, this court held that the whole scheme of Section 77 left no doubt that Congress did not mean to grant to the District Courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates and that it would violate the traditional respect of Congress for local interests and for the administrative process to imply a power in a single judge to disregard State law over local activities of a carrier.

The Court further in rejecting an argument of an implied power in Section 77 for supplanting State agencies, referred in a note to the difference between "physical invasion" and supplanting other remedies and stated that Congress did not intend that those who operate a business under control of a Federal Court should be immune from regulatory authority of the several States any more than they are from their taxing power.

In the face of this decision the opinion herein admits its effect will be, in respect to railroads in reorganization proceedings, to restrict the States in the exercise of their gen-

eral and customary sovereign powers in respect to the collection of taxes assessed against property within their borders.

The only power which Congress gave to these courts under Section 77 not vested in them under other bankruptcy proceedings, was as follows: "Process of the court shall extend to and be valid when served in any judicial district." (Section a.)

The reason for this was fully explained by this court in *Continental Ill. N. B. & T. Co. v. C. R. I. & P. R. Co.*, 294 U. S. 648, wherein it was pointed out that under *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, it was necessary to have an ancillary bankruptcy proceeding in every district where property of the bankrupt existed outside of his domicile.

This matter is discussed fully in *Thompson v. Terminal Shares* 104 Fed (2d) 1, by the Circuit Court of Appeals of the Eighth Circuit. It stated: "That provision is more procedural than jurisdictional."

The opinion therein refers to section 51 of the Judicial Code as relating to requirements that no civil suit shall be brought in any district against any person other than the district wherein he is an inhabitant, and also section 23 of the Bankruptcy Act as indicating that the continued resolve of Congress that a person should not be subject to civil suits except in the district in which they are inhabitants.

Section 23 has two sections. Section a relates to adverse suits. Section b provides that suits by a receiver or trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this act had not been instituted.

The Circuit Court of Appeals thus concluded: "The language used by Congress in Section 77, in conferring jurisdiction upon the courts of bankruptcy, does not, in our opinion, indicate any intention to abandon that policy with respect to such suits as this."

The position of these petitioners cannot be better stated than was thus stated by the Circuit Court of Appeals in that case, to-wit:

"Unquestionably, the claim of the trustee of the Missouri Pacific Railroad Company for an accounting and for the enforcement of the equitable lien asserted in an asset of the trust estate and as such is under the jurisdiction and control of the court of bankruptcy. The property upon which the lien is claimed and the persons of those who possess the property or have claims against it are not within the jurisdiction or under the control of the court of bankruptcy. The power of that court to preserve and safeguard the claim of the trustee does not carry with it the power to adjudicate his controversy with adverse and non-consenting defendants."

Now that same court speaking through different Judges authorized the Bankruptcy Court in St. Louis to send its process to the Corporation Commission of Arkansas, the Attorney General of Arkansas and 51 County Collectors of taxes in Arkansas and have them answer in said Bankruptcy Court in Missouri as to the validity and amount of taxes assessed by the Corporation Commission of Arkansas acting under statutes giving notice of hearing before action was taken by the Corporation Commission, and said statutes provide for any aggrieved taxpayer to carry his grievance to the Circuit Court at the seat of government clothed with complete authority to grant a speedy review

of the grievance and protect the parties' rights in the interim.

That same court has announced, applied and followed the following sound principles:

"When a state provides a tribunal for the hearing of complaints against assessments, such tribunal has exclusive jurisdiction."

McLaughlin v. St. Louis & Southwestern Ry. 232 Fed. 579; Missouri Pacific Railroad Co. v. Conway & Vilonia Road District., 280 Fed. 401.

The opinion herein quotes from *Kalb v. Feuerstein*, 308 U. S. 433 on the authority of the Constitution to grant Congress exclusive power. In fact, the right of Congress to limit the jurisdiction of the District Courts where the state affords a speedy and efficient remedy for the alleged grievance and where it provides that the suit shall not be brought by a trustee other than in such courts as the bankrupt could have brought them, are limitations on bankruptcy courts and just as valid as the power of jurisdiction granted them would be.

The court further states that it is vitally necessary that the Bankruptcy Court to which reorganization of railroads is conferred by section 77, should be empowered to determine the validity and amount of all liens against the railroad property, and to marshal them to accomplish the purpose of reorganization proceedings.

The complete answer to that proposition is found in *Thompson v. Terminal Shares*, 104 Fed. (2d) 1, as follows:

"The inquiry here, however, is not as to what Congress might have done, but as to what it actually did with respect to the jurisdiction of the bankruptcy courts in enacting and amending Section 77."

And it is submitted that this court has so far failed to find the power vested under section 77 in the Bankruptcy Court, which this Bankruptcy Court exerted in this instance.

3.

SECTION 64a IS INCONSISTENT AND NOT PART OF SECTION 77.

The court decided that Section 64a of the general Bankruptcy Act is applicable to proceedings under Section 77 thereof. Subdivision 1 of Section 77 provides that in all proceedings under it and consistent with its provisions, the jurisdiction and powers of the court etc., shall be the same as if a voluntary petition and adjudication had been had.

Finletter on Bankruptcy Reorganization, page 344, states:

“Section 77 makes no direct reference to Section 64, providing merely that “in proceedings under this section and consistent with the provisions thereof” the rights of creditors shall be the same as if a voluntary petition for adjudication had been filed and a decree entered thereon. This provision is sufficient, it is believed, to exclude Section 64 from application to proceedings under Section 77, for the scheme of Section 64 is inconsistent with the Railroad Act. The priorities which Section 64 establishes are those designed for ordinary bankruptcy, that is for a proceeding affecting unsecured debts only. They are not intended or appropriate for a proceeding which disturbs secured debts as well, and it was for this reason that Section 64 was excluded from application under Chapter X. Any reorganization proceeding which deals with secured debts must have a hierarchy of priorities which will put certain classes (such as administrative expenses)

ahead of the secured creditors, and Section 64 does not do so. It provides only for the "debts to have priority, in advance of the payment of dividends to (unsecured) creditors." Further there appears in Section 64 itself, by its references to arrangements and wage-earners' plans and its failure to refer to plans of reorganization (the term which would have been used had it been intended to refer to Section 77) an intention that its provisions shall not apply under the Railroad Act."

A review of some of the pertinent provisions of Section 77 (Title 11, Section 205, U. S. C. A.) shows the soundness of the above statement. The Judge shall require the Trustee to prepare and file with the Court in lieu of schedules as required in general bankruptcy, a list of bondholders and creditors, amount and character of the debts, securities etc., and a list of all stockholders. (c) (4). The Judge shall fix a reasonable time within which claims of creditors may be filed or evidenced and after which time no claim not filed or so evidenced may participate in the proceedings with an exception stated. Then after notice and hearing a division is made by the Court of creditors and stockholders into classes according to the nature of their respective claims and interests. "Such division shall not provide for separate classification unless there be substantial differences in priorities, claims and interests." (c) (7). Under the general act Section 57 prescribes a method of proof of claims, while Section 77 leaves to the judge the methods of requiring their evidence, and Section 57 further provides details for the allowance of claims, secured and unsecured. The proceedings under Section 77 is merely to ascertain the amount and classifications of claims in order to determine who may participate in the reorganization plan and vote thereupon.

Section 60 of the General Act provides for preferred creditors and their rights which cannot be pertinent in reorganization proceedings for the plan of reorganization covers that field.

Thereafter comes Section 64 dealing with debts which have priority in advance of dividends and establishing the order of their priorities. A Procrustean bed unfitted for reorganization. Section 64 deals entirely with the payment of the unsecured debts of the bankrupt. Its sole purpose is to give priority to certain of such debts over the payment of dividends to general creditors. In Re: Brannon 62 Fed. (2d) 959. (CCA5).

Section 77 does not contemplate the payment of debts at all, except as payments may be provided in the plan of reorganization in which their priorities are determined by the agreement, to be approved by the Interstate Commerce Commission and by the stockholders and creditors and confirmed by the Court.

The payment of debts as in ordinary bankruptcy is foreign to reorganization proceedings. Reorganization does not contemplate a sale by the court of any of the debtor's property for the purpose of paying the bankrupt's debts. Thompson v. The State of Louisiana, 98 Fed. (2d) 108. (CCA 8).

The cardinal purpose of Section 77 is to prevent a sale of the debtor's property and to guarantee its continued operation, while the ultimate end of all bankruptcy proceedings is the sale and disposal of all the property of the debtor and the payment of all debts so far as may be realized from such sales.

Section 64a is only intended to apply to proceedings where liquidation is contemplated. It has no other office

or purpose and liquidation can never occur under Section 77.

It is respectfully submitted that the Court was in error in holding that Section 64a was applicable to proceedings under Section 77.

4.

SECTION 64a NOT APPLICABLE TO TRUSTEES' TAXES.

There have been several minor changes in section 64, which is the section of the Bankruptcy Act establishing which debts have priority, but in its final form as now existing, so far as applicable here, reads as follows:

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition. * * *

"(4) Taxes legally due and owing by the bankrupt to the United States or any States or any subdivision thereof* * *

And provided further, that, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court."

The opinion holds the words "any taxes" used in paragraph 4 is not restricted to the bankrupt's taxes, but is applicable to the trustee's taxes also.

The same court in *Hennepin County v. M. W. Savage Factories*, 83 Fed. (2d) 453, a case originating under Section 77b and converted into a general bankruptcy proceeding said:

"The amendment of section 64a of the Bankruptcy Act (11 U. S. C. A. Sec. 104)—assuming that the law is relevant to the case at bar—does not touch the payment of taxes accruing during the trustee's possession."

That opinion, after reviewing decisions of two other Circuit Courts of Appeals, to the effect that 64a was not applicable to trustee's taxes in reorganization proceedings said:

"That seems to be a reasonable and sensible interpretation, since such taxes are not in a true sense taxes 'due and owing by the bankrupt,' but are ordinary carrying charges of property taken over and used by the trustees under order of the court in the conduct of their own operations and for the benefit of general creditors."

Under the decision here, taxes which are operating expenses are no longer in a class of operating expenses, but deferred to the fourth priority, a construction that would materially affect operation of properties in reorganization proceedings. However, a review of the general bankruptcy act makes the construction of the court here untenable.

In *Boteler v. Ingels*, 308 U. S. 57, the court stated:

"And 57 (a) makes clear that section 57 as a whole relates only to claims 'justly owing from the bankrupt to the creditor.' "

Subdivision (j) of said section 57 prohibits allowances against the bankrupt's estate of debts owing to the United States or any State or subdivision thereof as a penalty or a forfeiture, except for the amount of pecuniary loss sustained by the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable cost and interest.

Therefore, when tax penalties accrue, which is usual in bankrupt estates or forfeitures were claimed, it was necessary that the court cut out so much thereof as was penalty or forfeiture and allow the actual pecuniary loss sustained by the act or omission of the debtor. Hence, it followed that in providing for taxes due the United States or any State or subdivision thereof, that questions would arise as to whether penalties or forfeitures were included and, therefore, paragraph 4 contained the language giving the court authority to find the amount and legality of the taxes of the bankrupt or in the event of forfeitures or penalties, the loss accruing therefrom, rather than the penalty or forfeiture. This provision links with subdivision (j).

In *Boteler v. Ingels*, *supra*, the court had the question whether trustee's taxes in a reorganization proceeding was subject to penalties and held that they were, but that the bankrupt's taxes were not. In the decision the court referred to the Act of June 18, 1934, 48 Statutes at Large, p. 993, to the effect that a trustee shall be subject to all State and local taxes applicable to the business the same as if conducted by an individual or corporation. The court stated that this act indicated a Congressional purpose to facilitate, not to obstruct enforcement of State laws. Yet, the court's opinion here declares that State laws for collection of taxes assessed against property therein which is in reorganization proceedings in another State are silent pending such proceedings. The court held in this case that the taxes and penalties in issue were incurred by the trustee while operating the bankrupt's business and were not owed by the bankrupt and that regardless of other rights a State might have it could not file proof of claim for these taxes and penalties as a creditor under Section 57 of the Bankruptcy Act as it only applied to the debts of the debtor and not of his trustee.

5.

THE ORDER OF APRIL 11, 1940 WAS AN INJUNCTION.

The court in the opinion here declares that the order referred to was not an injunction within the meaning of the Johnson Act of 1934, 41 Statutes at Large, 775 (U. S. C. A. Title 28, Section 41). It was the duty of the trustee to pay these taxes because they were duly levied and assessed and without such order these taxes would have been paid by him. This order arrested the payment of 40% of the taxes assessed and levied in the hands of the collectors for collection amounting to \$416,043.71. The property being in the hands of the bankruptcy court prevented the collectors proceeding under the statutes to collect these taxes as they would have been required to have done under the law had not this order been issued. This order directed the trustee to hold in his hand said amount and practically operated as an injunction against the collectors' proceeding under the statute until the court in bankruptcy in St. Louis heard and determined the amount and validity of the taxes. This was an exercise of equity jurisdiction, operating in personam, requiring the trustee to do or refrain from doing the particular thing. Where a stay of proceeding is ordered or effectuated, it makes no difference whether the matter is pending in the same court or a different court or stopping a statutory proceeding. The essential element is an exercise of the equitable principle. The use of the words "refrain or enjoin" are not necessary words. It is the effect of the order, not its language which is to be considered.

Justice Van Devanter, then Circuit Judge, speaking for the Circuit Court of Appeals of the 8th Circuit, in *Griess v. Mutual Life Insurance Company*, 165 Fed. 48, declared such orders as this one an injunction within the meaning of the

statutes referred to. Later, through Judge Walter H. Sanborn, this same court approved and applied Justice Van Devanter's opinion. *Western Union Telegraph Co., v. U. S. & M. T. Co.*, 221 Fed. 543. This court has applied the same principle in *Enelow v. New York Life Ins. Co.*, 292 U. S. 379. The court answered the petitioner's contentions that this order was a violation of the tax statute of 1937, now a part of 24 Judicial Code (U. S. C. A. Title 28, Sec. 41) in the same way, namely, that this was not an injunction and, hence, it was immaterial that a plain, speedy and efficient remedy was provided by the statutes of the State for a judicial review in the courts of the State of the matters complained of in regard to the assessment. This Act was invoked in the *St. Francis Levee District* case, 98 Fed. (2d) 394, where it was held inapplicable, and properly so, for the taxes involved there were not taxes imposed by the laws of the State, but were imposed by mere local agency of the landowners and as was therein held this district was not a civil or political subdivision of the State, but a mere quasi public corporation.

6.

NON-JUSTICIABLE ISSUE

The opinion summarizes the allegations of the petition as to the issue presented therein which have been set forth in the statement of the case in the petition for certiorari. Then the court holds that it cannot say that these allegations are so entirely lacking in elements of fact that it does not raise the question as to the amount and legality of the taxes within the meaning of Section 64a. The petitioners' contention is that giving full sweep to the allegation of the wrongful method of making the assessment of the system value, yet it does not present a justiciable issue for judicial review in a State or Federal court. Each factor alleged

to have been used by the Commission is a factor commonly employed by courts and commissions in establishing value.

These various factors which were referred to in various decisions are considered in a Government Publication entitled: "Public Aids to Transportation," which was written by Charles S. Morgan, Director, Coordinator's Section of Research, in which there is found this statement in volume 2, at page 200:

"The different state assessing bodies use different methods of valuation. Few, if any, State boards confine themselves to only one formula for valuation, the great majority using combinations of two or more. The better known formulas are so-called physical valuation, cost of reproduction new less depreciation, original cost, book value, gross receipts, market value of stocks and bonds, and capitalization of net income."

Then the author proceeds to show weakness in each of the factors, particularly if used alone, and concludes the discussion as follows:

"These criticisms are essentially sound, but they can be overcome in large measure by a valuation method which employs a combination of two or more formulae. Further, the operation of valuation methods is not confined to the bare outlines mentioned, but in some instances involves consideration of average income, stock and bond prices, or physical valuations over a period of years. Irregularities are thus to some extent ironed out."

It is thoroughly settled by this court that evidentiary weight is a matter solely for the administrative board and is not a subject of judicial review. The last word is Rail-

road Commission v. Rowan & Nichols Oil Company, 310 U. S. 573 (Advance Opinion). Applying the same principles:

Federal Communication Commission v. Pottsville Broadcasting Co., 309 U. S. 134;

Nashville & Chatanooga, etc., v. Browning Adv. Opinion, 310 U. S. 362;

Great Northern Ry. Co., v. Weeks, 297 U. S. 135;

Rowley v. Chi. & N. W. R. R. 293 U. S. 102.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1940

715
No. _____

ARKANSAS CORPORATION COMMISSION, _____ *Petitioner,*

v.

**GUY A. THOMPSON AS TRUSTEE OF MISSOURI
PACIFIC RAILROAD COMPANY, DEBTOR _____** *Respondent.*

**SUPPLEMENTAL BRIEF IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI**

JACK HOLT,

*Attorney General of the
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Counsel for Petitioner.

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Supreme Court of the United States

ARKANSAS CORPORATION COMMISSION, *Petitioner,*

v.

GUY A. THOMPSON AS TRUSTEE OF MISSOURI
PACIFIC RAILROAD COMPANY, DEBTOR *Respondent.*

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Your petitioner respectfully asks leave to file a supplemental brief amplifying one of the points in the original brief, and citing additional authorities.

Respectfully submitted,

JACK HOLT,

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Supreme Court of the United States

ARKANSAS CORPORATION COMMISSION, _____ *Petitioner,*

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SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The opinion of the Circuit Court of Appeals appears
on page 45 of the record, and is reported in _____
Fed. (2d) _____.

The date of the decree to be reviewed is January 3,
1941.

The statutory provision which is believed to sustain the
jurisdiction of this court is section 240 of the Judicial Code
(28 U.S.C.A. sec. 347).

A concise statement of the case appears in the petition
for writ of certiorari, and is hereby adopted and made a
part of this brief.

The sole purpose of this brief is to amplify one of the
topics of the brief heretofore filed for the petitioner, and to
cite additional cases.

4

POINT AND AUTHORITIES RELIED ON

A.

Section 64 of the general bankruptcy act is not a part of section 77, the railroad reorganization amendment.

Boteler v. Ingels, 308 U.S. 61,

Brannon in re, 62 Fed. (2d) 959, (C.C.A. 5),

Cardwell in re, 52 Fed. (2d) 158,

Charles Nelson Co. in re, 27 Fed. Supp. 653,

Clayton Magazines in re, 77 Fed. (2d) 852, (C.C.A. 2),

Gould Manufacturing Company in re, 11 Fed. Supp. 644,

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City of Springfield v. Hotel Charles, 84 Fed. (2d) 589, (C.C.A. 1),

Henderson County v. Wilkins, 43 Fed. (2d) 670 (C.C.A. 4),

Hennepin County v. Savage Factories, 83 Fed. (2d) 453, (C.C.A. 8),

Hotel Martin Company in re, 114 Fed. (2d) 43, (C.C.A. 2),

Humeston in re, 83 Fed. (2d) 187 (C.C.A. 2),

Lang Body Company in re, 92 Fed. (2d) 338 (C.C.A. 6),

Lowden v. N. W. National Bank & Trust Company, 298 U.S. 160, 56 S. Ct. 696,

MacGregor v. Johnson-Cowdin, 39 Fed. (2d) 574
(C.C.A. 2),

New York O. & W. Ry. Co. in re, 25 Fed. Supp. 709,

168 Adams Building Corporation in re, 105 Fed. (2d)
704, (C.C.A. 7),

Palmer v. Commonwealth of Massachusetts, 308 U.S.
79, 60 S. Ct. 34,

Robertson v. Goree, 29 Fed. (2d) 261 (C.C.A. 5),

Simcox in re, 243 Fed. 479,

Thermodyne Radio Corporation in re, 26 Fed. (2d)
716,

Thompson v. Louisiana, 98 Fed. (2d) 108 (C.C.A. 8),

U. S. Fidelity & Guaranty Co. v. Sweeney, 80 Fed. 235
(C.C.A. 8),

11 U.S.C.A. sec. 104 (a), Pocket page 18,

11 U.S.C.A. sec. 205 (1).

ARGUMENT

I.

Section 64a of the general bankruptcy act is not a part of section 77, the railroad reorganization amendment.

The Circuit Court of Appeals held that section 64a was a part of section 77. The court seemed to be under the impression that the power of a bankruptcy court to determine the validity of tax claims in a railroad reorganization proceeding stemmed entirely from section 64a, and if this section were not a part of section 77 the court would not possess the power.

The question is one of great public importance in view of the many railroad reorganization proceedings that are now pending. It is equally important in its relation to the exercise of state taxing power. It ought to be authoratively settled.

Section 64a as amended by the act of June 22, 1938, known as the Chandler act, reads in part as follows:

"The debts to have priority, in advance of payment of dividends to creditors, and to be paid in full out of the bankrupt's estate, and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any state or any subdivision thereof; *provided* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court; *And provided further*, That in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court."

Subsection 1 of section 77 provides as follows:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

11 U.S.C.A. sec. 205 (1).

Whether or not section 64a is a part of section 77 depends on whether 64a is "consistent with the provisions" of section 77.

An analysis of section 64a shows that it is wholly inconsistent with section 77.

The purpose of the general bankruptcy act, of which section 64a is a part, is to bring about a sale of all the assets of the bankrupt and a distribution of the proceeds among the creditors. The purpose of section 77 is to avoid a sale of any of the property of the debtor railroad company, and to guarantee the continuance of the operation of the railroad for the benefit of the public.

Section 64a is the priority section of the bankruptcy act. Its sole purpose is to give priority to certain classes of unsecured debts over the payment of dividends to general creditors and to prescribe the order in which the several classes of debts are to be paid.

"Section 64, known as the priority section of the Bankruptcy Act, relates exclusively to the subject of the rights of priority of payment arising among those whose claims would, in the absence of such section,

stand on terms of equality before the law as general unsecured creditors."

In Re Cardwell, 52 Fed. (2d) 158.

See also:

In Re Brannon, 62 Fed. (2d) 959, (C.C.A. 5)

Section 77 does not contemplate the payment of debts at all except as payment may be provided for in a reorganization plan. The payment of debts as in ordinary bankruptcy is foreign to the very genius of its purpose.

The taxes referred to in subdivision (4) of section 64a are "taxes due and owing by the bankrupt," that is, taxes that accrued before the institution of bankruptcy proceedings. Such taxes, if they are not a lien on the property of the bankrupt, are classified in the fourth class by section 64a and are to be paid ahead of dividends to general creditors.

Though taxes due and owing by the bankrupt are given the priority of the fourth class by section 64a, they do not take precedence in the order of their payment over liens and encumbrances.

"Section 64a of the Bankruptcy Act, in directing payment of taxes before dividends to creditors, means general creditors. When by the local law a lien for a private debt is superior to a claim for taxes, its status is preserved by section 67d."

City of Richmond v. Bird, 249 U.S. 174.

See also:

U. S. Fidelity & Guaranty Co. v. Sweeney, 80 Fed. (2d) 235, (C.C.A. 8)

In Re Brannon, 62 Fed. (2d) 959, (C.C.A. 5)

Taxes are not mentioned in section 77, but taxes due and owing by the bankrupt would be claims in a railroad reorganization proceeding. If they were not a lien on the property of the debtor they would be classified as unsecured claims, but the classification would be for voting purposes only.

Taxes "due and owing by the bankrupt" which are a lien on the property of the bankrupt do not fall within the fourth class under section 64a. The lien is not displaced by supervening bankruptcy. But the fourth subdivision of section 64a provides that "no order shall be made for the payment of the tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court." It is with reference to taxes due and owing by the bankrupt and especially with reference to such taxes which are liens on the property of the bankrupt that subdivision (4) prescribes: "Provided Further, That (2) in case any question arises as to the amount or legality of any taxes such question shall be heard and determined by the court."

If a tax due and owing by the bankrupt is a lien on property of the bankrupt section 64a requires the court to determine whether it will take possession of the property *cum onere* the tax or reject the property. If it takes possession, it must order the trustee to pay the tax even though the amount of the tax exceeds the value of the property of the estate.

Hennepin County v. Savage Factories, 83 Fed. (2d) 453, (C.C.A. 8)

In Re Brannon, 62 Fed. (2d) 959, (C.C.A. 5)

City of Richmond v. Bird, 249 U.S. 174.

The court cannot refuse to take possession of property belonging to the bankrupt under section 77 because it is burdened with taxes. A supposititious case will illustrate the point:

If a branch line of a railroad is so worthless that it does not pay operating expenses, and its value to the railroad company is less than the amount of accumulated tax liens against it, the possession of the branch line would nevertheless immediately vest in the bankruptcy court on the approval of the petition in a reorganization proceeding under section 77, and the court would be powerless to dispossess itself of it. The court would have no authority under section 77, as it would have in ordinary bankruptcy, under section 64, to order the trustee not to take possession of the branch line as a part of the debtor's estate. The branch line could only be abandoned, under section 77, pursuant to proceedings before the Interstate Commerce Commission under the Transportation Act.

Palmer v. Commonwealth of Massachusetts, 308 U.S. 79; 60 Sup. Ct. 34.

The taxes which fall in the fourth class under section 64a are taxes which are to be paid out of the proceeds of a sale of the assets of the bankrupt estate.

"Section 64a gives the rule for paying out the money arising from the bankrupt's property which remains for general distribution after all special liens and encumbrances have been dealt with."

In Re Brannon, 62 Fed. (2d) 959, (C.C.A. 5)

There is never any money "arising from the bankrupt's property which remains for general distribution after all special liens and encumbrances have been dealt

with," under section 77. That section does not authorize a sale of the debtor's property for the purpose of paying its debts. The whole purpose of section 77 is to prevent a sale of the debtor's property and to keep it intact so as to guarantee its continued operation.

Section 64a is a priority section and is only applicable to liquidation. Liquidation can never occur under section 77.

Liquidation may occur under section 77B, 11 U.S.C.A. sec. 207, and that section appropriately provides that if a reorganization proceeding is converted into a liquidation proceeding section 64a shall become operative.

Clause (8) of subsection (c) of section 77B provides that if the reorganization plan is not confirmed the judge may "direct the estate to be liquidated." Clause (5) of subsection (k) provides that if an order of liquidation is entered "debts shall be entitled to priority as provided in section 104 (section 64a) of this title."

No such provisions are found in section 77, and there could be no occasion under that section for according priorities to certain classes of debts over the payment of dividends to general creditors.

The legal consistency which constitutes the test of the applicability of any section of the bankruptcy act to section 77 is not a strained or forced reconciliation of the particular section with section 77, but is a consistency with the general scope and purpose of section 77 and a logical complement in the accomplishment of that purpose. The special object of section 77, therefore, must be kept in mind. Its objective is altogether different from the objective of the bankruptcy act.

"A proceeding of reorganization is not a bankruptcy, though an amendment to the bankruptcy act creates and regulates the remedy."

Lowden v. N. W. National Bank & Trust Co., 298 U.S. 160,

S. C. 56 Sup. Ct. 696.

Thus, applying the consistency test, it was held that section 68a of the bankruptcy act, 11 U.S.C.A. sec. 108 (a) which provides that "in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed and paid," was wholly inconsistent with the purpose of section 77 and was therefore not a part of that section.

Lowden v. Northwestern Nat. Bank & Trust Co., 84 Fed. (2d) 847. (C.C.A. 8)

We have been testing the consistency of section 64a with section 77 by showing that the priorities prescribed by section 64a which are to be accorded certain enumerated claims for payment out of the proceeds of the property of the estate ahead of dividends to general creditors, and especially the classification of taxes due and owing by the bankrupt, do not fit into the picture of section 77, and are at variance with its purpose.

Taxes which accrue against the property of the debtor in the possession of the trustee during the pendency of ordinary bankruptcy or of railroad reorganization proceedings are a part of the expense of administering the estate. They are not classifiable under section 64a in ordinary bankruptcy, and they are not classifiable as claims against the debtor's estate in reorganization proceedings. They are

expenses incurred by the court itself in the management of the estate, and are payable ahead of all other claims, like the compensation to the trustee and the expense of preserving and operating the estate.

Hennepin County v. Savage, 83 Fed. (2d) 453,
(C.C.A. 8)

Thompson v. Louisiana, 98 Fed. (2d) 108
(C.C.A. 8)

Boteler v. Ingels, 308 U.S. 61,

In Re Charles Nelson Company, 27 Fed. Supp. 673,

Robertson v. Goree, 29 Fed. (2d) 261 (C.C.A. 5)

MacGregor v. Johnson-Cowdin, 39 Fed. (2d) 574,
(C.C.A. 2)

In Re Humeston, 83 Fed. 187 (C.C.A. 2)

The tax involved in this litigation is an ad valorem tax imposed by the State of Arkansas on the physical properties of the debtor within its borders. Under the laws of the state the tax is a first-lien on such properties. The tax was levied during the pendency of the reorganization proceedings and is therefore a part of the expense of administration. It does not fall within the scope or purview of section 64a.

The whole purpose of 64a is to accord propriety to certain claims in the order named ahead of dividends to general creditors. The section is entitled "Debts Which Have Priority." It begins as follows:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full

out of bankrupt estates, and the order of payment, shall be."

11 U.S.C.A. sec. 104 (a)

The Circuit Court of Appeals apparently held that the district court obtained jurisdiction of the tax claim filed by the state under 64a. This is wholly incorrect. It derived its jurisdiction of the entire reorganization proceeding from section 77, and it has inherent jurisdiction, like any other court, to pass on and allow the expense of administration of an estate in its custody. The application of 64a to the tax in question would lead to utter confusion. For illustration, if the tax is governed by section 64a it would have to be classified as a fourth class claim under that section. And while it would have to be paid ahead of dividends to general creditors (and there are no dividends to general creditors under section 77) it might be subordinated to or put on a parity with lien claims. This seems to be what the Circuit Court of Appeals had in mind, for it said:

"It is vitally necessary that the bankruptcy court to which the reorganization of the railroad debtor herein has been confided by section 77 of the Act shall be empowered to determine the validity and amount of all liens against the railroad property and to marshal them in order to accomplish the purpose of the reorganization proceedings. Section 64a confers such power in respect to taxes."

Section 77 does not contemplate or provide for a marshalling of liens in a reorganization proceeding. The court is not concerned with that subject at all. Everything of that character has to be worked out through the reorganization plan, subject to the approval of the creditors, the stockholders, the Interstate Commerce Commission and the court.

On account of the conflicting opinions of district courts and of Circuit Courts of Appeals with reference to the construction of section 64a, and the power of a bankruptcy court in determining the legality and amount of taxes under that section, a holding that section 64a is a part of section 77 would introduce utter confusion in railroad reorganization proceedings.

It has been held that the decisions of this court to the effect that a taxpayer must exhaust the administrative remedy provided by law for relief against an excessive and discriminatory assessment before he can resort to the courts are not applicable to bankruptcy proceedings, and that a trustee in bankruptcy is not required to exhaust the administrative remedy. *In re Thermidyne Radio Corporation*, 26 Fed. (2d) 716. It has been held, on the contrary, that a trustee in bankruptcy must exhaust the administrative remedy. *City of Springfield v. Hotel Charles*, 84 Fed. (2d) 589. (C.C.A. 1). It has been held that the action of the bankruptcy court "is not a review of the action of the taxing authorities," but is "a determination under the statute of the amount which should be paid on the claim for taxes." *Henderson County v. Wilkins*, 43 Fed. (2d) 670, (C.C.A. 4). It has been held, on the contrary, that the law presumes that the assessment made by the taxing authorities is correct, and that the burden is on the trustee in bankruptcy "of showing that they transgressed all reasonable limits, in derogation of the trustee's rights in the property." *In re Lang Body Company*, 92 Fed. (2d) 338. (C.C.A. 6). Certiorari denied, *Hipp, Trustee, v. Boyle, Treasurer*, 303 U.S. 637, 58 Sup. Ct. 522. It has been held that it is "the power and duty of this court (the bankruptcy court) to reassess the tax in case objection is made, regardless of its

original assessment by the proper state authority," and that the reassessment "must be upon evidence in this court going directly to the merits." *In re Simcox*, 243 Fed. 479. It has been held, on the contrary, that "taxes—except when challenged for illegality because of a want of power to levy, or in respect of a failure to pursue indispensable steps of procedure in assessing or levying—are incontestible." *In re Gould Manufacturing Company*, 11 Fed. Supp. 644. It has been held that the "court in a bankruptcy proceeding has jurisdiction to re-examine and revise a state tax and allow it for only the amount which appears to be justly due." *In re New York, O. & W. Ry. Co.*, 25 Fed. Supp. 709. It has been held, on the contrary, that "the court must first pass on the validity of the tax before it can decide whether to allow or disallow the claim," and that "the court must determine the validity of the tax in accord with the laws of the taxing sovereign." *In re 168 Adams Building Corporation*, 105 Fed. (2d) 704. (C.C.A. 7) It has been held that where a state statute provides for a suit in the state court to recover a refund of an illegal tax, a trustee in bankruptcy is not required to pursue that remedy. *In re Clayton Magazines*, 77 Fed. (2d) 852. (C.C.A. 2) And it has been held, on the contrary, that where a state statute required a suit to test the validity of an assessment to be brought in a state court within thirty days, the assessment was conclusive against a trustee in bankruptcy who had failed to bring such a suit. *In re Hotel Martin Company*, 114 Fed. (2d) 43. (C.C.A. 2)

Many other conflicts appear in the decisions with reference to an alleged special and peculiar power of a court of bankruptcy under the aegis of section 64a. The confusion arising out of these conflicts, and the consequent effect of such confusion on the taxing systems of the state, make it

extremely important that this court should determine whether or not section 64a is a part of section 77.

Respectfully submitted,

JACK HOLT,

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State of Arkansas,*

Counsel for Petitioner.

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**IN THE
Supreme Court of the United States**

**OCTOBER TERM, 1940
No. 715**

THE ARKANSAS CORPORATION COMMISSION AND FIFTY-ONE COUNTY TAX COLLECTORS OF ARKANSAS-----Petitioners

Vs.

GUY A. THOMPSON, AS TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR-----Respondent

BRIEF OF THE PETITIONERS

**JACK HOLT,
Attorney General.**

**LEFFEL GENTY,
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IN THE
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THE ARKANSAS CORPORATION COMMIS-
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Counsel for Petitioners.

Statement

The Missouri Pacific Railroad Company is in bankruptcy in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, at St. Louis, in a corporate Reorganization Proceeding under Section 77 of the Bankruptcy Act. The Trustee, under orders of Court, operates the railroad in fifty-one (51) Counties in Arkansas.

On April 11, 1940, the Trustee filed in said District Court a Petition Relative to the Taxes for 1939, Assessed against property of the Trustee in Arkansas.

It is necessary to give the structure of this Petition (Transcript, pages 6 to 20) as the Circuit Court of Appeals held its allegations sufficient to give said District Court in Bankruptcy jurisdiction of the amount of the assessment levied against the Trustee's operating property in Arkansas.

The Petition Alleges

That the Trustee was under order of Court authorized to pay taxes on property of the Debtor for which the Debtor or Trustee was obligated by law to pay; that questions have arisen with respect to the legality and amount of the general taxes assessed and levied for the year 1939 against property of the trust estate then owned and operated by the Trustee; that jurisdiction was given the Bankruptcy Court under Section 64 (a), paragraph 4, of the General Bankruptcy Act of 1938, to determine the question of legality and amount of the taxes. The Petition, however, does not correctly state the terms of said section and, paragraph, which relates only to taxes of the bankrupt prior to the bankruptcy proceeding and establishes the priority of such debts when ascertained.

The Petition alleges some of the provisions of the Arkansas Statutes for assessing railroad operating property and the levy and collection of taxes thereupon. In substance, the power and duty of assessment is vested in a State Board designated as the Arkansas Corporation Commission and it is required to consider what a clear fee simple title would sell for under usual conditions of sale of such character of property; and further to consider in so far as other evidence and information in its possession does not make it improper or unjust to do so, the market or actual value of its outstanding capital stock and funded debt and income.

The Petition does not allege, but the Statute, section 2044, Pope's Digest (see Appendix), also requires the Commission to consider the estimated investment and valuation of the property as set up in the Company's books as the basis for adjustment of rates or charges for services, and such other information as to value the Commission may obtain.

The Petition alleges that the value determined by the Commission shall be certified and apportioned to the Counties for the levy and collection of taxes upon such assessed valuation as are levied and collected upon property of local owners.

The Petition alleges the companies are required to make returns of their property and valuation and income, etc.; and those were duly made; and that thereafter the Commission is to assess the property.

The Petition alleges that the Trustee was given notice of the impending assessment and that he appeared and protested the tentative amount thereof; and a final hearing was set for December 4, 1939, and after said hearing the final assessment was made of the Trustee's property

in Arkansas in the sum of \$28,050,000. That on December 5th, distribution and apportionment was made of the amount to the several counties as required by law and the taxes were levied in such Counties in the amounts set forth in the Petition, and warrants for the collection thereof were in the hands of the local tax collectors at the time the Petition was filed.

The Petition alleged this assessment was based on a System value of \$247,565,396; and that there was allocated to Arkansas of it 28.39411 per cent and after said allocation to Arkansas an equalizing factor of 40% was applied thereto, resulting in the aforesaid amount. As neither the allocation factor or equalization factor is assailed, only the System value, further reference to them is unnecessary.

The Petition alleged the System value was arrived at by a composite average of various factors in which 25 per cent consideration was given to the stock and bond values for a five-year period preceding the assessment; 25 per cent consideration to Capitalization of Earnings at the rate of 6% per annum for said period; 25 per cent consideration to Reproduction Cost less depreciation as found by the I. C. C.; 12½ per cent consideration to book value as carried on the books of the Railroad Company, and 12½ per cent consideration to the gross income for the five year period.

The Petition does not assail use of the stock and bond factor and the Capitalization of Earning factor, on the contrary alleges they were proper factors upon which to make the assessment without considering other factors, and that the consideration of those other factors—Reproduction costs less depreciation, book value and gross income—resulted in establishing an over assessment of the Trustee's property which was discriminatory under the Arkansas

Constitution, and in violation of the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The Petition alleges the use of the proper factors, excluding the alleged improper ones, would have resulted in an assessment of the Trustee's property in the sum of \$16,830,000, and sets up an apportionment thereof to the Counties. This table shows the difference in taxes between the assessment made by the Commission and that which the Trustee alleges should have been made, amounts to the sum of \$416,043.17. This sum was alleged to be "the amount of taxes in dispute," arising out of the 1939 assessment, and that the taxes based on that assessment now constitute a lien on the property of the Trustee and such lien casts a cloud upon the Trustee's title to said property, the removal of which will be a necessary step in consummation of the Debtor's reorganization. Trans. 6-19.

The Petition failed to allege the Arkansas statutory remedy for a tax payer having such grievance as is set out in this Petition which remedy is found in Sections 2019-2020 of Pope's Digest. See Appendix.

Briefly, it is an appeal from the final Order of the Commission to the Pulaski Circuit Court, a court of general jurisdiction at the seat of government, with provisions for temporary or other proper relief, pending the hearing, and a requirement of advancement to a speedy hearing and further provides for an appeal to the Supreme Court by an aggrieved party with like requirements for advancement upon the docket.

The Supreme Court of Arkansas has held this to be a judicial review of the action of the administrative body.

Clear Creek Oil & Gas Co. v. Spelter Co., 161 Ark. 12.

Instead of pursuing this remedy the Trustee prayed in his Petition that he be authorized to pay the taxes which he sets up therein should be paid, and he withhold and refrain from paying to the collectors the taxes which he disputes, amounting to \$416,043.17, until the Court hears and determines the amount and legality thereof. Upon the coming in of the Petition the Court ordered the Trustee to pay the taxes to the collectors according to the amount set up by the Trustee in his Petition, which should be paid, and the Trustee was ordered "to withhold and refrain from paying the collectors of said respective Counties, any additional taxes for the year 1939, based on the assessment heretofore made upon the properties of the Trustee in said State by the Corporation Commission of the State of Arkansas, pending determination by this Court of the amount and legality of the taxes assessed against the property of the Trustee in said respective Counties for the year 1939." Trans. p. 25.

The Petition was set for hearing at a date certain and notice of the same and a copy of the aforesaid order was directed to be sent to the Attorney General of Arkansas, the Corporation Commission of Arkansas, and the Fifty-One County Collectors holding the warrants for the collection of the taxes. Tr. page 21.

Motion to Dissolve and Dismiss

The Attorney General, the Corporation Commission and the Fifty-One Collectors filed a Petition to Dissolve the Injunction and Dismiss the Petition, (Tr. pages 25-34) upon the following grounds:

- (1) The assessment was an Order of a Board of the State where reasonable notice was given and full hearing had and where a plain, speedy and efficient remedy was

available to the Petitioner, for the matters and things alleged in said Petition, which remedy was provided in Sections 2019-2020, Pope's Digest.

(2) The assessment made by the Corporation Commission was the basis for a tax imposed by and pursuant to the laws of the State, and taxes accruing in each County as set forth in the Petition were taxes imposed by the laws of the State, and similar allegations were made as to the plain, speedy and efficient remedy provided by the statutes.

(3) The Petition is based on an assumed authority given the District Court in Bankruptcy, under Section 64 (a) (4) of the Bankruptcy Act of 1938, and the Commission alleged said provision establishes priority in debts of a bankrupt estate in liquidation, and if applicable to proceedings under Section 77, is only applicable to taxes due by the bankrupt estate prior to bankruptcy, while the amounts here involved are taxes assessed against the Trustee operating the property. The Commission further alleges that under Chapter IV, Section 23 (b) of the Bankruptcy Act of 1938, the Trustee could only prosecute a suit in a Court where the Bankrupt could have done so had not bankruptcy intervened, assailing the validity of said assessment.

(4) The Commission alleges Section 64 (a) of the Bankruptcy Act was inconsistent with proceedings under Section 77 and is not applicable herein.

(5) The fifth point was not pressed, in the court below and the sixth point now become the fifth, and is that the Petitioner does not present a justiciable controversy. The Petition shows that the alleged method used in making the assessment was purely an administrative question as to the proper weight to be attached to various recognized factors, and not a question for court review.

For each of the aforesaid reasons the Commission prayed that the Injunction be dissolved and also that the Petition be dismissed.

The District Court overruled said Motion, holding it had jurisdiction under 64 (a), notwithstanding the appeal was not taken to the courts in Arkansas, which right was given to the Trustee by the Statutes. Tr. page 39. 33 Fed. Supp. 728. These Petitioners appealed to the Circuit Court of Appeals and it affirmed the decision of the District Court. 116 Fed. (2d) 179.

Explanatory Note:

References to the record are to the transcript as filed in the Circuit Court of Appeals. The final record is in process of printing and we are assured the paging will be the same. The order of argument follows the order of discussion in the opinion of the Circuit Court of Appeals instead of the order set out in the Motion.

POINTS TO BE ARGUED, AND AUTHORITIES

1. Error to follow St. Francis Levee Dist. Cases

AUTHORITIES

St. Francis Levee Dist. v. Kurn, 91 Fed. (2d) 118.
St. Francis Levee Dist. v. Kurn, 98 Fed. (2d) 394.
St. Francis Levee District v. Frisco Railroad, 74 Fed. (2d) 186.
Palmer v. Massachusetts, 308 U. S. 79.
Railroad Commission v. Rowan & Nichols Oil Co., 310 U. S. 573.
Nashville & Chattanooga, etc. Railroad v. Browning, 310 U. S. 362.
Thompson v. Terminal Shares, 104 Fed. (2d) 1.
Re: Missouri Pacific RR Co., 33 Fed. Supp. 728.
Section 77, Section 77b and Section 23b, Chapter 4 of the Bankruptcy Act.
Section 60, 57 and 64a.

2. Powers of Bankruptcy Court Exceeded

AUTHORITIES

Palmer v. Massachusetts, 308 U. S. 79.
Continental Ill. N. B. & T. Co. v. C. R. I. & P. R. R. Co., 294 U. S. 648.
Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734.
Thompson v. Terminal Shares, 104 Fed. (2d) 1.
McLaughlin v. St. Louis & S. W. Ry., 232 Fed. 579.
Missouri Pacific RR Co. v. Conway & Vilonia Road Dist., 280 Fed. 401.
Massachusetts v. Palmer, 101 Fed. (2d) 48.
Palmer v. Massachusetts, 308 U. S. 605.
Sections 77, and 77b of the Bankruptcy Act.
The Johnson Act of 1934, Title 28, Sec. 41, U. S. C. A.
The Tax Act of 1937, Title 28, Sec. 41, U. S. C. A.

3. Section 64a Is No Part of Section 77

AUTHORITIES

Finletter on Bankruptcy Reorganization, p. 344.
Section 77, Bankruptcy Act, (Title 11, Section 205, U. S. C. A.)
In Re: Brannon, 62 Fed. (2d) 959, (CCA) 5.
Thompson v. The State of Louisiana, 98 Fed. (2d) 108, (CCA 8).
Sections 77, 77b, 57 and 64a of the Bankruptcy Act.

4. Section 64a Not Applicable to Trustees' Taxes

AUTHORITIES

Hennepin County v. M. W. Savage Factories, 83 Fed. (2d) 453.
U. S. C. A., Title 11, Section 104, (64a).

Boteler v. Ingels, 308 U. S. 57.
Act of June 18, 1934, 48 Statutes at Large, page 993.
Thompson v. Louisiana, 98 Fed. (2d) 108.
Haggerty v. Michigan, 286 U. S. 334.
Robertson v. Goree, 29 Fed. (2d) 595.
Macgregor v. Johnson-Cowdin-Emmerich, 39 Fed. 574.
Sections 77, 77b, 57 and 64a of the Bankruptcy Act,
Title 28, Section 124, U. S. C. A.

5. Order of April 11, 1940, was an Injunction

AUTHORITIES

Johnson Act of 1934, 41 Statutes at Large, 775 U. S.
C. A., Title 28, section 41.
Griessa v. Mutual Life Ins. Co., 165 Fed. 48.
Western Union Telegraph Co. v. U. S. & M. T. Co., 221
Fed. 543.
Enelow v. New York Life Ins. Co., 293 U. S. 379.
Section 24, Judicial Code (U. S. C. A.) Title 28, Sec-
tion 41.

6. The Trustee Had Adequate Remedy in State Courts

AUTHORITIES

Martineau v. Clear Creek Oil & Gas Co., 141 Ark. 596,
Pope's Digest, Section 1936.
Clear Creek Oil & Gas Co., vs. Ft. Smith Spelter Co.,
161 Ark. 12.
Fort Smith Spelter Co. v. Clear Creek Oil & Gas Co.,
267 U. S. 231.
Atlas Life Ins. Co. v. Southern, 306 U. S. 561.
Terry v. New York, 104 Fed. (2d) 498.
East Ohio Co. v. Cleveland, 84 Fed. (2d) 443.
McLaughlin v. St. Louis & S. W. Ry. Co., 232 Fed. 579.
Missouri Pacific Ry. Co. v. Conway & Vilonia Road
Dist., 280 Fed. 401.

7. The Trustee's Petition Presents Non-justiciable Issue

AUTHORITIES

Public Aids to Transportation, Coordinator's Section
of Research, Vol. 2, p. 200.
Railroad Commission v. Rowan & Nichols Oil Co., 310
U. S. 573.
Federal Communication Commission v. Pottsville
Broadcasting Co., 309 U. S. 134.
Nashville & Chattanooga, etc. v. Browning, Adv.
Opinion, 310 U. S. 362.
Rowley v. Chi. & N. W. RR., 293 U. S. 102.
Central Ry. v. Martin, 115 Fed. (2d) 968.
The Johnson Act of 1934, USCA, Title 28, section 41.

ARGUMENT

The St. Francis Levee District Cases

The opinion is based primarily on the earlier decisions of that court in the St. Francis Levee District cases, the first of which was *St. Francis Levee District v. Kurn*, 91 Fed. (2) 118 and the last *St. Francis Levee District v. Kurn*, 98 Fed. (2) 394. It is of no interest now whether these cases were correctly decided or not. They are not a proper basis for this decision.

The first case was an appeal from an interlocutory injunction granted by the United States District Court for the Eastern District of Arkansas in a suit therein brought by the Trustee against the District which involved foreclosure suits brought by the District against the Trustee. The second was an appeal from an order of the Bankruptcy Court in St. Louis requiring the district to file its claims therein on or before a specified date or be barred and enjoining other foreclosure suits which had been brought since the first suit. These suits did not involve any actions of the State Board nor any taxes imposed by the State or its political subdivisions. The court held in these cases that the District was not a civil or political agency of the State, that it was a mere quasi public corporation like a railroad. There was no statutory remedy for a judicial review of the assessments made by the Board, the only provision was for an administrative review which was discussed fully by the court in *St. Francis Levee District v. the Frisco Railroad*, 74 Fed. (2), 186.

The District Court in this case followed these cases as binding upon it, and an interesting article reviewing the decision of the District Court is found in the *Yale Law Journal* of the November 1940 issue, entitled: "Jurisdiction of a Federal Bankruptcy Court to Rule on State Taxes." Furthermore, these cases were decided before this

court rendered its decisions in the cases of *Palmer v. Massachusetts*, 308 U. S. 79, *Railroad Commission v. Rowan and Nichols Oil Company*, 310 U. S. 573, and *Nashville and Chattanooga, etc., Railroad v. Browning*, 310 U. S. 362.

These St. Francis Levee District cases were in effect overruled by a decision of the same court in *Thompson v. Terminal Shares*, 104 Fed. (2d) 1.

It is interesting to note the sequence of events. That decision was rendered on May 18, 1939. The order made by the District Court in the similar case preceding this one brought in 1939 over the taxes of 1938 shows that the order therein, which was identical with the order in this case, "freezing" 40% of the taxes as assessed and levied, was made on April 12, 1939. *Missouri Pacific RR. Co.*, 33 Fed. Supp. 728. (Tr. p. 35).

Therefore at the time the Trustee prayed for such order and it was granted by the District Court for the Eastern District of Missouri where the proceedings were pending he was advised, and the court was convinced, that its process could run outside of the District and bring in other parties with whom the Trustee had a controversy, to settle their controversy in the Bankruptcy Court.

However, after May 18, 1939, when this decision was delivered this Trustee was pointedly informed by the Court of Appeals:

"To sustain the lower court's jurisdiction of this suit would do violence to the general policy of Congress that persons shall not be subjected to civil suits except in the districts of which they are inhabitants."

Thompson vs. Terminal Shares, 104 Fed. (2) 1.

Attention is called to the situation presented to the court, which resulted in the above statement. This Trustee of

this railroad filed a suit in the court where the proceedings were pending in the Eastern District of Missouri against eighteen defendants, none of whom were residents of the Eastern District of Missouri. The purpose of the suit was to set aside fraudulent and ultra vires contracts made by the Debtor, and recover a large sum of money from the defendants and impress an equitable lien on property which was not situated in the Eastern District of Missouri.

The defendants were all served without the Eastern District of Missouri and filed a motion to quash the services, which motion was granted by the District Court and affirmed by the Circuit Court of Appeals. The opinion makes a careful analysis of the provisions of section 77 of the Bankruptcy Act and reviews many pertinent authorities construing it, and the companion section 77b provisions.

The court copied in the opinion the old bankruptcy statute which is now brought forward in the 1938 Act, and is now section 23b, Chapter IV, to the effect that suits by a Trustee in Bankruptcy shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, with certain exceptions not pertinent here.

The court applied this section to the controversy then and reached this conclusion:

“Unquestionably, the claim of the trustee of the Missouri Pacific Railroad Company for an accounting and for the enforcement of the equitable lien asserted is an asset of the trust estate and as such is under the jurisdiction and control of the court of bankruptcy. The property upon which the lien is claimed and the persons of those who possess the property or have claims against it are not within the jurisdiction or un-

der the control of the court of bankruptcy. The power of that court to preserve and safeguard the claim of the trustee does not carry with it the power to adjudicate his controversy with adverse and nonconsenting defendants."

Thompson vs. Terminal Shares, 104 Fed. (2) 1.

It is clear therefore that the court then disapproved the action which had been approved in the last of the St. Francis Levee District cases, where the Levee Board was brought into the court in St. Louis to settle the controversy between it and the Trustee. This case is almost identical in principle with the Terminal Shares case. None of the defendants were served in the Eastern District of Missouri. On the contrary were all served in their official residences in Arkansas, and this petition makes plain that the relief which was sought was in every respect analogous to the relief which this same trustee sought in the Terminal Shares cases.

Here the Petition alleges that it was necessary for the court to determine whether the Trustee's property must bear an excessive and unlawful exaction of \$416,043.17, which is the amount of taxes in dispute, and then alleged that the taxes based on said assessment now constitute a lien on the property of the Trustee in Arkansas and such lien casts a cloud upon the Trustee's title to said property, the removal of which will be a necessary step in the consummation of the Debtor's reorganization.

Thus the Trustee sought in this case to resist the claim of a large amount of money, just as in the other case he was seeking to recover a large amount of money, and in this case was seeking to remove a tax lien from his property in Arkansas, as in the other case he was seeking to impress a lien on property without the Eastern District of

Missouri. However the order that is now attacked was made April 11, 1940, almost a year after the Circuit Court of Appeals had taken this positive position in the Terminal Shares case against such order. The error is graver here than in the Terminal Shares case, because here a State Board created by the Constitution and statutes of the State and the Attorney General of the State and fifty-one County Tax Collectors were brought into the court in Missouri to answer a controversy with the Trustee over the amount of taxes due to the State of Arkansas and its counties, and to remove a lien from its real and personal property in Arkansas.

The Circuit Court of Appeals of the Third Circuit recently in *Central RR of New Jersey vs. Martin*, 115 Fed. (2d) 968, held that a similar proceeding in a federal district court in New Jersey in bringing in the State and County officers and Attorney General of New Jersey over a controverted assessment made pursuant to the statutes of New Jersey was in effect a suit against the State of New Jersey, and not within the jurisdiction of a Federal Court.

Powers of Bankruptcy Court

Palmer v. Massachusetts, 308 U. S. 79, is controlling here. In Massachusetts there is a Department of Public Utilities vested with regulatory power over railroads, including the power to authorize the abandonment of stations.

In Arkansas prior to 1933 there were two regulatory state boards—one the Tax Commission, authorized to assess operating property of railroads, and the other the Railroad Commission with regulatory power over railroads, including the same powers vested in the Massachusetts Department of Public Utilities.

In 1933, the General Assembly abolished the dual board and vested authority theretofore vested in each in the Corporation Commission, this appellant. It is a Constitutional and statutory State Board of equal state dignity as the Department of Public Utilities of Massachusetts.

The New York, New Haven and Hartford Railroad Company filed a petition for reorganization under Section 77 of the Bankruptcy Act and "invoked the shelter of the United States District Court for the District of Connecticut."

This court entertaining jurisdiction operated the railroad through trustees from 1935, and was so operating it in 1937, when the trustees filed a petition with the Department of Public Utilities of Massachusetts to abandon 88 stations in that state.

During the pendency of that Petition the Trustees evidently impressed with the super powers of the Bankruptcy Court abandoned their Petition in Massachusetts and joined with creditors in a Petition to the Bankruptcy Court in Connecticut for the same relief which was prayed in the petition to the Department of Public Utilities in Massachusetts, to-wit, the abandonment of 88 stations. The District Court ruled that Section 77 of the Bankruptcy Act gave it the responsibility of disposing of the petition, and after taking testimony granted it.

The Commonwealth of Massachusetts appealed to the Circuit Court of Appeals and it reversed the District Court. 101 Fed. (2d) 48. The Commonwealth did not dispute the findings of fact by the District Court justifying the abandonment of the stations, and on the other hand the Trustees did not dispute that the order must rest upon some power conferred on the Reorganization Court. Thus the issue was narrowed to whether relief should be sought be-

fore the State Board vested with authority to grant it, or a District Judge sitting in bankruptcy in another state. After stating the arguments of the Trustees to sustain jurisdiction of the Bankruptcy Court the Court of Appeals stated:

"We see no justification for so trenching upon the usual powers of a state while the reorganization remains in substance a receivership, as it does before the plan is confirmed. Of course the judge supersedes the corporate officers and the shareholders, and may, through his trustees, exercise all their powers." * * *

"But we cannot see why, merely because the road may in the end be reorganized, the Judge should be able to dispense with those conditions which the state has imposed upon the grant that alone makes lawful any operation of the road whatever. So to construe the language of subdivisions (c) and (o) is to make him the tribunal to weigh and decide between the conflicting interests of the owners and the public. The notion behind the regulation of public utilities by specially qualified officials is that a judge is not qualified for such duties—at least in the first instance, or until the facts have been sifted and arranged. Assuming that a bankruptcy act might constitutionally go that far, only inescapable language could justify our imputing to Congress the intent to confer so extreme and unnecessarily provocative a power. The powers of trustees in reorganization are, to some degree at any-rate, measured by those of receivers in equity (subd. (c) (2), 11 U. S. C. A., Sec. 205 (c) (2), and it has long been the settled policy of Congress to subject receivers in their management of the properties in their custody to the laws of the states, section 124 Title 28, U. S. Code, 28 U. S. C. A., sec 124."

Mass. vs. Palmer, 101 Fed. (2) 48.

The case then came to this court and the decision of the Circuit Court of Appeals was affirmed, and these excerpts from the opinion are equally applicable to this case as to the Massachusetts case:

"In view of the judicial history of railroad receiver-ships and the extent to which section 77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a complete plan of reorganization for an insolvent road." . . .

"But, in any event, against possible inconveniences due to observance of state law we must balance the feelings of local communities, the dislocation of their habits and the over-riding of expert state agencies by a single judge sitting, as in this case, in another state, removed from familiarity with local problems, and not necessarily gifted with statesmanlike imagination that transcends the wisdom of local attachments."

Palmer vs. Mass. 308 U. S. 79.

In Note 17 to the case, the court referred to *Re Tyler*, 149 U. S. 164, and other decisions of this Court cited by the Trustees and stated that they dealt with attempts at "physical invasion" of the property held in the custody of a Federal Court. Then it stated:

"Section 65 of the Judicial Code (March 3, 1911) 36 Stat. at L. 1104, chap. 231, 28 USCA, sec. 124) decisively indicates that Congress did not intend that

those who operate a business under the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power."

Palmer vs. Mass. supra, n. 17.

It is interesting to note that a summary of the authorities cited by the Trustees included the St. Francis Levee District cases herein discussed. This court had the benefit of those cases when it rendered this decision, which as we view it is entirely contrary to the doctrines announced in said cases.

Had the Corporation Commission in this case been dealing with one of its other powers, that is, the regulation of railroad services within the state, then this case would have rendered proceedings in bankruptcy to the same end futile, and the interpretive note referred to shows the minds of the court ran to state control of taxation, as well as state regulation of railroads.

In *Continental Illinois N. B. & T. Co. v. C. R. I. & P. R. Co.*, 294 U. S. 648, the court pointed out that under *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 739, it was necessary in order to give full sweep to the bankruptcy powers over assets of estates in bankruptcy outside of the district of the bankruptcy proceeding, to have ancillary proceedings in the district where the property was located.

Therefore when Congress provided for railroad reorganization in bankruptcy this provision for process running without the District became necessary, as thus explained by the court:

"Section 77 deals with railway corporations whose lines and activities are not confined to a single district or a single state, but in numerous instances reach into

many districts and many states. The lines of the Rock Island system extend into 20 districts and 14 states. Jurisdiction over reorganization proceedings, however extensive the railway lines may be, is conferred upon a single district court. The usefulness of the section would be greatly minimized and in some instances destroyed if that court were powerless to send its process into any state when necessary to effectuate the purposes of the law."

Continental Pet. Co. vs. C. R. I. & P. R. Co., 294 U. S. 648.

When the Massachusetts case was before the Circuit Court of Appeals the Trustees argued that in order to effect reorganization the Bankruptcy Court must be immune from local interference. The court said they might feel some force in this argument if the court had found it would defeat any plan of reorganization to be devised to let these stations continue, but indicated that until it was proved that the particular thing would defeat the plan of reorganization, the bankruptcy power could not be invoked and stated: "Mere pendency of the reorganization does not affect pre-existing powers."

Mass. vs. Palmer, 101 Fed. (2) 48.

The Circuit Court of Appeals of the Eighth Circuit in *Thompson v. Terminal Shares*, 104 Fed. (2d) 1, in discussing this provision of the Bankruptcy Act, said:

"Since Section 77 as amended in 1935 and Section 77B are identical with respect to the jurisdiction of the bankruptcy courts, except that under Section 77 the courts are expressly given the power to send process outside their districts, it is apparent that if jurisdiction of this suit exists as claimed by the appellant, it must be because of the process provision of

Section 77. To our minds that provision is more procedural than jurisdictional. We think it was intended to make certain that the bankruptcy court had the means for making the jurisdiction otherwise conferred upon it, with respect to the property in its custody, effective beyond the limits of the district."

The court in the opinion here cites as sustaining the power of the Bankruptcy Court the following: The St. Francis Levee District cases (91 Fed. (2) 118, 98 Fed. (2) 394); *Ex Parte Baldwin*, 291 U. S. 618; *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734; *Henderson County v. Wilkins*, 43 Fed. (2) 670 and *New York v. Irving*, 288 U. S. 229.

Ex Parte Baldwin restates the principles announced in *Isaacs v. Hobbs Tie & Timber Company* of exclusiveness of the jurisdiction of the Bankruptcy Court of the custody and possession of the bankrupt property wherever situated and to protect its jurisdiction. The Court stated: "Such power is not peculiar to bankruptcy or to Federal Courts." *Ex Parte Baldwin, supra*, 618. It stated that the jurisdiction to protect its possession may issue either from the court of original jurisdiction or the Federal Court of the District where the property is situated, but it is to be noted that the powers therein referred to are all for protection of possession.

It further held that Section 23b of the Bankruptcy Act (forbidding suits by trustees other than where the bankrupt could have brought them) only relates to suits where the trustee was plaintiff and had no restrictive effect on the right of the trustee or receiver to protect his possession.

"There is not the semblance of protection of the possession of the property in the Petition which is now under review. On the other hand the controversy in the *Baldwin* case was over a suit brought in the State Court asserting title in fee

to a part of an interurban road which was in possession of the trustees. The court held that the trustees could restrain such suit but did not sustain them in their effort for a mandamus—which was the form of this suit, because the Trustee had a common remedy by injunction which could be granted by the Bankruptcy Court unless in its discretion it concluded the litigation should proceed in the State Court.

There is nothing in this case to sustain the opinion of the Court of Appeals; on the contrary the analysis of the Bankruptcy powers demonstrates that the Bankruptcy Court has not the power which it assumed in this case. There is no element herein affecting the custody of the Debtor's property.

The Court plainly stated that injunction was the common remedy to protect the possession of the bankrupt estate and necessarily their possession was not involved—all state laws and other Acts of Congress were in full force.

Isaacs v. Hobbs Tie & Timber Company was a landmark in bankruptcy jurisprudence. It stated the exclusive jurisdiction of the bankruptcy court over the assets of the bankrupt, no matter where they were situated and pointed out the remedy by ancillary proceedings and by injunction to sustain the jurisdiction of the court over the estate in its hands.

The Henderson County case was decided in 1930 before the Johnson Act of 1934 or the Tax Act of 1937 were enacted, and it did not fall within the inhibition of section 23b of the Bankruptcy Act, and of course no question of reorganization entered therein. It was ordinary bankruptcy of a hotel corporation and the claim for taxes did not arise from any action of a State Board from whose order an appeal would give a judicial review thereof. The facts were

briefly these: The hotel property was listed by its owner at a valuation of \$250,000 in 1926 and the company went into bankruptcy in 1927, and the hotel was then incomplete. Finally it was sold in bankruptcy for \$110,000. After the owner assessed the property in 1926 no further returns were made and in default thereof the taxing officers carried forward the old assessment and taxes were based thereupon, and the Trustee protested the amount thereof and an issue of fact was raised and determined first before the Referee and then before the Court and the value was fixed at \$110,000.

There was much discussion of the power of the Bankruptcy Court in such cases, but as no issue here raised was there raised, the discussion is academic.

The Irving Trust Company case was one of ordinary bankruptcy where the State of New York filed claim for taxes due it from the bankrupt prior to bankruptcy. Such a claim properly fell within Section 64a (4) of the Bankruptcy Act. The Court made an order barring all claims which were not filed within a given date. The New York tax claim was not filed within that date and the sole question was whether such order was valid against the State.

It was held that to properly administer bankrupt estates the allowance of claims, reduction of the estate to money and its distribution, and the determination of preferred claims, in priorities were confided to the Bankruptcy court; and if the state desired to participate in the distribution of the estate it must comply with the orders of the Court.

Certainly this case does not support the power of the bankruptcy court to bring the officers of another state before it to determine the validity of the action of the State Board where a speedy and efficient remedy was afforded under the laws of the state for any complaint against the

assessment. In fact it merely sustained the right of the Bankruptcy Court to issue an order barring all claims which were not filed within the designated time; and it has no bearing here; other than the statement of the purposes of ordinary bankruptcy proceedings, and the effect of Section 64a therein, which shows the utter inconsistency of making said section a part of the proceeding under Section 77 of the Bankruptcy Act.

The Circuit Court of Appeals of the Eighth Circuit has applied a sound principle to tax cases arising in Arkansas which deprived any other court than the one provided by statute with jurisdiction to hear them. It is thus stated in the syllabus in *Missouri Pacific R. C. v. Conway and Vilonia Road Dist.*, 280 Fed. 401:

“A provision of Road Laws Ark. 1919 vol. 1, p. 387, sec. 5, for an appeal by a landowner, deeming himself aggrieved by the assessment of his lands, to the chancery court, with right of appeal to the Supreme Court, provides an exclusive method for review of assessments for a highway, so that suits in equity attacking the assessment must be dismissed.”

To the same effect see *McLaughlin v. St. Louis & S. W. Ry.*, 232 Fed. 579.

Section 64a Is Inconsistent and Not Part of Section 77.

The court decided that Section 64a of the general Bankruptcy Act is applicable to proceedings under Section 77 thereof. Subdivision 1 of Section 77 provides that in all proceedings under it and consistent with its provisions, the jurisdiction and powers of the court etc., shall be the same as if a voluntary petition and adjudication had been had.

Finletter on Bankruptcy Reorganization, page 344,
states:

"Section 77 makes no direct reference to Section 64, providing merely that "in proceedings under this section and consistent with the provisions thereof" the rights of creditors shall be the same as if a voluntary petition for adjudication had been filed and a decree entered thereon. This provision is sufficient, it is believed, to exclude Section 64 from application to proceedings under Section 77, for the scheme of Section 64 is inconsistent with the Railroad Act. The priorities which Section 64 establishes are those designed for ordinary bankruptcy, that is for a proceeding affecting unsecured debts only. They are not intended or appropriate for a proceeding which disturbs secured debts as well, and it was for this reason that Section 64 was excluded from application under Chapter X. Any reorganization proceeding which deals with secured debts must have a hierarchy of priorities which will put certain classes (such as administrative expenses) ahead of the secured creditors, and Section 64 does not do so. It provides only for the "debts to have priority, in advance of the payment of dividends to (unsecured) creditors." Further there appears in Section 64 itself, by its references to arrangements and wage-earners' plans and its failure to refer to plans of reorganization (the term which would have been used had it been intended to refer to Section 77) an intention that its provisions shall not apply under the Railroad Act."

A review of some of the pertinent provisions of Section 77 (Title 11, Section 205, U. S. C. A.) shows the soundness of the above statement. The Judge shall require the Trustee to prepare and file with the Court in lieu of schedules

as required in general bankruptcy, a list of bondholders and creditors, amount and character of the debts, securities etc., and a list of all stockholders. (c) (4). The Judge shall fix a reasonable time within which claims of creditors may be filed or evidenced and after which time no claim not filed or so evidenced may participate in the proceedings with an exception stated. Then after notice and hearing a division is made by the Court of creditors and stockholders into classes according to the nature of their respective claims and interests. "Such division shall not provide for separate classification unless there be substantial differences in priorities, claims and interests." (c) (7). Under the general act Section 57 prescribes a method of proof of claims, while Section 77 leaves to the judge the methods of requiring their evidence, and Section 57 further provides details for the allowance of claims, secured and unsecured. The proceedings under Section 77 is merely to ascertain the amount and classifications of claims in order to determine who may participate in the reorganization plan and vote thereupon.

Section 60 of the General Act provides for preferred creditors and their rights, which cannot be pertinent in reorganization proceedings for the plan of reorganization covers that field.

Thereafter comes Section 64 dealing with debts which have priority in advance of dividends and establishing the order of their priorities.

The Circuit Court of Appeals of the Fifth Circuit in *In Re Brannon*, 62 Fed. (2d) 959, said: "Section 64 gives the rule for paying out the money arising from the bankrupt's property which remains for general distribution after all special liens and incumbrances have been dealt with," citing many cases.

Section 77 does not contemplate the payment of debts at all, except as payments may be provided in the plan of reorganization in which their priorities are determined by the plan, to be approved by the Interstate Commerce Commission and by the stockholders and creditors and confirmed by the Court.

The payment of debts as in ordinary bankruptcy is foreign to reorganization proceedings. Reorganization does not contemplate a sale by the court of any of the debtor's property for the purpose of paying the *bankrupt's debts*, but on the contrary contemplates continuance of the corporation, and the Trustee holds the title to the property for the sole purpose of rehabilitation. *Thompson v. The State of Louisiana*, 98 Fed. (2d) 108, (CCA 8).

The cardinal purpose of Section 77 is to prevent a sale of the debtor's property and its continued operation, while the ultimate end of all bankruptcy proceedings is the sale and disposal of all the property of the debtor and the payment of debts so far as may be realized from such sales.

Section 64a is only intended to apply to proceedings where liquidation is contemplated. Liquidation can never occur under section 77. A plan of Reorganization is approved or the proceeding is dismissed. Under 77b, now Chapter X if a plan fails, the Court may order liquidation. No such power exists in the court under Section 77.

Section 64a Not Applicable to Trustees' Taxes.

There have been several minor changes in Section 64, which is the section of the Bankruptcy Act establishing which debts have priority, but in its final form as now existing, so far as applicable here, reads as follows:

“(a) The debts to have priority, in advance of the

payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition. * * *

“(4) Taxes legally due and owing by the bankrupt to the United States or any States or any subdivision thereof. * * *

“And provided further, that, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court.”

The opinion holds the words “any taxes” used in paragraph 4 is not restricted to the bankrupt’s taxes, but is applicable to the trustees’s taxes also.

It is submitted that such construction is contrary to the text. The only class of taxes where express authority is given to the Bankruptcy Court to hear and determine them are those within the fourth priority. That class consists of taxes legally due and owing by the bankrupt to the United States or any States or subdivisions thereof.

Thus the United States placed its own taxes against the bankrupt in the fourth class priority and the states’ as well.

There were good reasons therefor. These are taxes of a wreck, while the trustees’ taxes are to salvage a wreck.

Subdivision (J) of Section 57 of the Bankruptcy Act prohibits the allowance of tax penalties or forfeitures accruing in favor of the United States or a State against a bankrupt estate.

It was held in *Boteler v. Ingels*, 308 U. S. 57, that when the tax penalty accrued against the bankrupt it could not be

collected, but those accruing against the trustee were collectible from the Bankrupt estate, and the difference between the taxes of a trustee and a bankrupt is therein pointed out.

For these and other causes it was reasonable to assume that there would be a contest over taxes of the bankrupt estates, whether they included penalties, or what-not, and in order that the estates might be promptly administered to the end that distribution be made, the Bankruptcy Court was given jurisdiction to hear and settle those issues. The text confines this power to the bankrupt "taxes due to the state or the government." The law is so written and it should be so enforced. The taxes of the trustee are on a wholly different basis, and if Section 64a is applicable at all, they would be in the first priority as part of the expenses of preserving the property.

However, they need no classification and there is no need to invoke 64a to class them as administrative expenses.

The Circuit Court of Appeals of the Eighth Circuit in *Thompson vs. State of Louisiana*, 98 Fed. (2d) 108, held that the franchise taxes of Louisiana, against the trustee of the Missouri Pacific Railway Company were administrative expenses.

The court quoted from the opinion of Mr. Justice Cardozo speaking for this court in *Haggerty v. Michigan*, 286 U. S. 334, which case was dealing with an equity receivership. In part the quotation was as follows:

"Viewing the receivership in its true light as one, not to wind up the corporation, but to foster the assets, we think the annual taxes accruing while the receiver was in charge must be deemed expenses of ad-

ministration and therefore charges to be satisfied in preference to the claims of general creditors."

Thompson vs. State of Louisiana, 98 Fed. (2) 108.

Thus the principle prevailing in equity receivership was accepted by the Court of Appeals as applicable to the Trustee of the Missouri Pacific Railway Company and he was compelled to pay as administrative as expenses, franchise taxes of Louisiana and Arkansas.

The Court pointed to Title 28, Section 124, USCA, making a trustee in bankruptcy operating a business under order of a Federal Court subject to all state and local taxes applicable to such business as if conducted by an individual or corporation, as fortifying its conclusion.

Furthermore the court said that when the Debtor filed its petition for Reorganizatoon under Section 77 of the Bankruptcy Act it not only invoked all applicable provisions of the Act, but "subjected itself to all obligations which the Act might invoke." Thus the Trustee has assumed the obligation to pay such taxes as his Debtor had to pay and has assumed to stand in the shoes of his Debtor when he seeks to bring a suit to protect his real or imagined grievances, and to bring it only where his debtor could have brought it. However, this is not the first time said court has held that a Trustee's taxes were administrative expenses and not controlled by section 64a.

In *Hennepin County v. M. W. Savage Factories*, 83 Fed. (2d) 453, a case originating under Section 77b and converted into a general bankruptcy proceeding it said:

"The amendment of section 64a of the Bankruptcy Act (11 U. S. C. A. Sec. 104)—assuming that the law is relevant to the case at bar—does not touch the payment of taxes accruing during the trustee's possession."

That opinion, after reviewing decisions of two other Circuit Courts of Appeal, to the effect that 64a was not applicable to trustee's taxes in reorganization proceedings said:

"That seems to be a reasonable and sensible interpretation, since such taxes are not in a true sense taxes 'due and owing by the bankrupt,' but are ordinary carrying charges of property taken over and used by the trustees under order of the court in the conduct of their own operations and for the benefit of general creditors."

Under the decision here, taxes which are operating expenses are no longer in a class of operating expenses, but deferred to the fourth priority, a construction that would materially affect operation of properties in reorganization proceedings.

The Circuit Court of Appeals of the Fifth Circuit in *Robertson v. Gore*, 29 Fed. (2d) 261 and the Second Circuit in *MacGregor v. Johnson Cowdin-Emmerich*, 39 Fed. (2d) 574, each held the Trustee's taxes were administrative expenses and were not taxes of the bankrupt and were not within the 4th paragraph.

The Order of April 11, 1940, Was an Injunction.

The court in the opinion here declares that the order referred to was not an injunction within the meaning of the Johnson Act of 1934, (U. S. C. A. Title 28, Section 41.) It was the duty of the trustee to pay these taxes because they were duly levied and assessed, and without such order these taxes would have been paid by him. This order arrested the payment of 40% of the taxes assessed and levied in the hands of the collectors for collection amounting to \$416,043.17. The property being in the hands of the Bank-

ruptcy Court prevented the Collectors proceeding under the statutes to collect these taxes as they would have been required to have done under the law had not this order been issued. This order directed the Trustee to hold in his hand said amount and effectually operated as an injunction against the collectors proceeding under the statute until the court in bankruptcy in St. Louis heard and determined the amount and validity of the taxes.

This was an exercise of equity jurisdiction operating in personam, requiring the trustee to do or refrain from doing the particular thing. Where a stay of proceeding is ordered or effectuated, it makes no difference whether the matter is pending in the same court or a different court or stopping a statutory proceeding. The essential element is an exercise of the equitable principle. The use of the words "refrain or enjoin" are not necessary words. It is the effect of the order, not its language which is to be considered.

Justice Van DeVanter, then Circuit Judge, speaking for the Circuit Court of Appeals of the Eighth Circuit, in *Griesa v. Mutual Life Insurance Company*, 165 Fed. 48, said:

"As the order or decree in question was made upon a hearing in equity and was interlocutory, the decisive question is, Did it grant an injunction? To us the answer does not seem doubtful. A court of equity possessed no power to stay proceedings in a court of law, save by granting an injunction against the litigant actors therein, and this is so well recognized that when, in a court of equity, a stay of proceedings in an action at law is sought or ordered, it is understood that it is this injunctive power that is invoked or exercised, although the technical terms "restrain and enjoin" be not used. Plainly the insurance company intended to seek, and the Circuit Court intended to grant, in the

suit in equity, an order staying proceedings in the action at law, and the record furnishes no reason for believing that either intended that the order should be other than an authorized exertion of the injunctive power."

Later, through Judge Walter H. Sanborn, this same court approved and applied Justice Van DeVanter's opinion. *Western Union Telegraph Co. v. U. S. & M. T. Co.*, 221 Fed. 543. This court has applied the same principle in *Enelow v. New York Life Ins. Co.*, 292 U. S. 379.

In *Gainsburg v. Dodge*, 193 Ark. 473, the Court quoted approvingly:

"A writ of injunction may be defined as a judicial process, operating in personam, and requiring the person to whom it is directed to do or refrain from doing a particular thing."

The court answered the petitioner's contentions that this order was a violation of the tax statute of 1937, now a part of 24 Judicial Code (U. S. C. A. Title 28, Sec. 41) in the same way, namely, that this was not an injunction and, hence, it was immaterial that a plain, speedy and efficient remedy was provided by the statutes of the State for a judicial review in the courts of the State of the matters complained of in regard to the assessment.

Adequate Remedy for the Alleged Grievances Provided in the State Law.

The opinion of the Circuit Court of Appeals stated that it was immaterial to consider whether there was a remedy for the Petitioner and his alleged grievances in the State courts. We assume this was on the theory that the Order of April 11, 1940, was not an injunction and therefore the

Johnson Act of 1934 and the Tax of 1937 were inapplicable.

We have elsewhere discussed the injunctive effect of that order. As we view it, it is material to see the rights provided by the laws of Arkansas to the Trustee for his grievances as alleged in his Petition. As heretofore stated, prior to 1933 Arkansas had two State Boards with jurisdiction over railroads—one the Tax Commission with duties of assessing taxes of public utilities and the other the Railroad Commission with the duties of regulating railroads.

Appeals from the action of the Railroad Commission were provided by the statute, but no appeal was provided from orders of the Tax Commission. However, the Supreme Court had worked out relief in equity for non-appealable orders of the Tax Commission when a taxpayer had such rights as alleged the Petitioner has in this case. *Martineau vs. Clear Creek Oil & Gas Co.*, 141 Ark. 596.

This is not material now other than to demonstrate that Arkansas has always furnished an adequate remedy to taxpayers from any unconstitutional or arbitrary invasion of their rights.

In 1933 the Legislature abolished the Tax Commission and the Railroad Commission and created the Arkansas Corporation Commission and vested the sole body with all the jurisdiction and duties of the two preceding bodies.

Section 9 of the Act of 1933—now Pope's Digest, section 1936, reads: "Appeals may be taken from the action of the Commission in the manner and within the time and to the court now prescribed by law for appeals from the Railroad Commission."

The exact nature of this review was before the Supreme

Court in Clear Creek Oil & Gas Co. v. Spelter Co., 161 Ark. 12.

"Therefore the presumption is that the rates fixed by the Commission are reasonable, and the burden of proof is upon the company contesting the rates to show to the contrary. Our statute contemplates a judicial review of the Circuit Court of the law and the facts as presented to the Commission, and it is the duty of the Circuit Court to try the questions of law and fact upon the same record as the Commission, bearing in mind that the Commission is a rate-making body created by the Legislature, and its orders are prima facie correct, and that this presumption in their favor will yield only to the probative force of the evidence in the record. It is not the duty of the court to establish the rates, but to determine whether the rates as established by the Commission, when considered in the light of the evidence, are reasonable.

Upon appeal to this court we are called upon to inquire into the weight of the evidence for the purpose of determining whether or not the judgment of the Circuit Court is against the preponderance of the evidence."

This case was carried by writ of error to this court and it affirmed the decision of the Supreme Court of Arkansas.

Fort Smith Spelter Company v. Clear Creek Oil & Gas Co., 267 U. S. 231. This case was decided by the Supreme Court of Arkansas November 5th, 1923—ten years before the Legislature abolished the Tax Commission and vested its powers in the Corporation Commission, and granted a right of appeal from orders of that Commission to the Court. Therefore, when the Legislature granted this right of appeal to the court, it did so with full knowledge that it granted a judicial review from all orders of the Corporation Commission.

The statutory procedure is copied in the Appendix. Attention is called to these features of it:

First: It provides that the appeal shall be given preference over all other cases on the docket in the Circuit Court, and in the Supreme Court shall be treated as involving public interest and advanced and given preference on the docket.

Second: It gives express authority to the Circuit Judge when the appeal is lodged in the Circuit Court to issue temporary or preliminary orders as he may deem proper until the decree is rendered.

Thus the execution of adverse orders may be stayed and the Supreme Court has the inherent right to do so when the case reaches that court on appeal.

Thus a speedy review is assured and judicial authority to protect all needed rights pending the litigation; and the decisions of the Supreme Court of Arkansas are subject to review in this court, as in the Spelter Company case. It is immaterial whether the remedy in the State courts is in equity or at law.

In *Atlas Life Ins. Co. v. Southern*, 306 U. S. 561, one of the questions was whether the adequate remedy at law which would preclude a court of equity from granting relief must be one available in Federal Court. The Court said:

"By long-settled construction, the accepted test of legal adequacy which the section prescribes is the legal remedy which the federal, rather than state, courts afford," citing cases.

"But although the adequacy of the legal remedy precludes resort to a federal court of equity, it does not follow that the converse is true—that the want of a legal remedy

in the federal courts gives the suitor free entrance to a federal court of equity." Further the court said:

"It is no ground for equitable relief that the suit at law is brought in a state rather than a federal court, for the insurance company's defense may be protected there as well as in a federal court, and in that case there is no threat of irreparable injury. See *Cable v. U. S. L. Ins. Co.* 191 U. S. 288. On comparable grounds a federal court may withhold its aid when a plaintiff has failed to resort to a state administrative remedy."

The Circuit Court of Appeals of the Eighth Circuit in *Terry v. New York Life Ins. Co.*, 104 Fed. (2d) 498, had before it a similar question, and said:

"The mere fact that the suit at law which is imminent can be brought only in the state court, or that it is pending there, is immaterial," citing many cases, and quoting from *Atlas Insurance Co.* case just referred to.

The Sixth Circuit Court of Appeals in *East Ohio Co. v. City of Cleveland* 84 Fed. (2d) 443, held that the Johnson Act applied when the state court afforded a remedy, in that case in equity, for the matters complained of in a federal suit.

We have heretofore called attention to two decisions of the Circuit Court of Appeals of the Eighth Circuit, that where the State affords a remedy for the alleged grievances of the taxpayer, the remedy is exclusive, and for convenience, repeat the citations:

McLaughlin v. St. Louis & S W Ry., 232 Fed. 579;

Missouri Pacific RR Co. v. Conway and Vilonia Road
Dist., 280 Fed. 401.

Non-Justiciable Issue

This opinion summarizes the allegations of the Petition as to the issue presented therein which have been set forth in the Statement. The Petitioners' contention is that giving full sweep to the allegation of the wrongful method of making the assessment of the system value, yet it does not present a justiciable issue for review in a State or Federal Court. Each factor alleged to have been used by the Commission is a factor commonly employed by courts and commissions in establishing value.

These various factors which were referred to in various decisions are considered in a Government Publication entitled: "Public Aids to Transportation" which was written by Charles S. Morgan, Director, Coordinator's Section of Research, in which there is found this statement in volume 2, at page 200:

"The different state assessing bodies use different methods of valuation. Few, if any, State boards confine themselves to only one formula for valuation, the great majority using combinations of two or more. The better known formulas are so-called physical valuation, cost of reproduction new less depreciation, original cost, book value, gross receipts, market value of stocks and bonds, and capitalization of net income."

Then the author proceeds to show weakness in each of the factors, particularly if used alone, and concludes the discussion as follows:

"These criticisms are essentially sound, but they can be overcome in large measure by a valuation method which employs a combination of two or more formulae. Further, the operation of valuation methods is not confined to the bare outlines mentioned, but in some instances involves consideration of average income, stock

and bond prices, or physical valuations over a period of years. Irregularities are thus to some extent ironed out."

It is thoroughly settled by this court that evidentiary weight is a matter solely for the administrative board and is not a subject of judicial review.

In *Rowley v. Chicago & N. W. R. Co.*, 293 U. S. 102, the Court said:

"The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property," citing many cases.

The last word directly on the subject is *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U. S. 573.

To safeguard its oil resources Texas devised a regulatory scheme for their proration and placed its administration in the Railroad Commission's hands.

In conformity with procedural provisions of the statute, the Commission issued a Proration Order concerning East Texas oil fields. Each well was allowed to produce 2.32% of its hourly potential, and its practical operations cut across by allowances to marginal wells which limited application of the rule of the daily allowables to one-third of the total for the class in which the Respondent's wells fell.

For years much effort had been made by the Commission to work out proper factors for proration, and also for the

involved situation of rights growing out of marginal wells. The court said:

"State agencies have encountered innumerable difficulties in trying to adjust the many conflicting interests which grow out of the rule of capture and its implications."

Railroad Commission vs. Rowan & Nichols Oil Co.,
310 U. S. 573.

The case abounded in expert testimony on the one side to support other formulas and factors to achieve perfect proration and on the other side to support the formula and factors adopted as reasonably applicable to accomplish a fair result.

"These touch matters of geography, geology, physics and engineering," the court said:

"But whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment."

Railroad Commission vs. Rowan & Nichols Oil Co.,
310 U. S. 573.

The Petition here renders an issue that a formula allegedly used by the Commission consists of a composite of five factors, each of them well known valuation factors for ascertaining value; and that this was wrong in that only two of these factors should be used.

Experts in economics, taxation, valuation, markets and railroad operations are invited by such allegations, and such allegations can only be sustained or refuted by potent experts if this issue is to be tried out in the court.

The controlling principle is thus stated:

"Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. Except where the jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."

Railroad Commission vs. Rowan & Nichols Oil Co.,
310 U. S. 573.

The Court concluded the discussion as follows:

"It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."

Railroad Commission vs. Rowan & Nichols Oil Co.,
310 U. S. 573.

In *Federal Communications Commission v. Pottsville Broadcasting Co.* 308 U. S. 605, there was a question of relationship of the judiciary to an administrative board, in this instance a Federal Administrative Board, but the principle is necessarily applicable to a State Board, especially in view of the Johnson Act of 1934, giving orders of State Boards Federal safe-guards. The Court said:

"A review by a federal court of the action of a lower court is only one phase of a single unified process. But

to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued.

“The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of ‘judicial power’ conferred by Congress under the Constitution.

“But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, or the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.”

Fed. Communication Com. vs. Pottsville Broadcasting Co., 308 U. S. 605.

Nashville, Chattanooga, etc. Ry. v. Browning, 310 U. S. 362, supports the principles herein sought to be applied.

In *Central R. Co. of New Jersey v. Martin*, 115 Fed. (2d) 968, the Third Circuit Court of Appeals, had before it allegations quite similar to those in the Petition here, but the

Court held that they were untenable and did not present issues for judicial review. In substance, the court holds that under the Browning case the Court could not sustain the bill under the Due Process Clause and that it was violation of the state laws; it ruled that this was not a matter for consideration in the Federal Court, as it did not amount to an arbitrary denial of the Due Process of law, and stated:

“Certainly it would not be beyond the legislative power of the state to prescribe such bases for the valuation of railroad property as a class.”

We have heretofore referred to and attach in the Appendix the Arkansas statute requiring the Corporation Commission to give consideration to the very factors of which complaint is here made.

Therefore, it is submitted the Petition on its face presents only a question of the relation of recognized evidentiary factors, and these are exclusively questions for the state board to give to them such weight as in their considerate judgment should be given thereto.

Respectfully submitted,

JACK HOLT,
Attorney General.

LEFFEL GENTY,
Assistant Attorney General.

JOSEPH M. HILL,

HENRY L. FITZHUGH,
Counsel for Arkansas Corporation Commission and Fifty-one County Collectors.

APPENDIX

Statutory rule for assessing property by the Corporation Commission. Pope's Digest of the Statutes of Arkansas, sec. 2044:

"The valuation of the property of all persons, firms, companies, co-partnerships, associations and corporations required by law to be assessed by the Commission shall be made upon the consideration of what a clear fee simple title thereto would sell for under conditions under which that character of property is usually sold. As evidence tending to show what this would be the Commission, insofar as other evidence and information in its possession does not make it appear improper or unjust for it to do so, shall ascertain as nearly as it can and consider the market or actual value of all outstanding capital stock and funded debt and the income of such companies, and also the estimated investments and valuation of said property as set up by the officers or agents of such companies as a basis for the adjustment of rates or charges for service to the public by such companies, and such other information as to value the Commission may obtain."

Appeal from the Corporation Commission to the Court—
Pope's Digest, sections 2019 and 2020:

2019: "Appeal from Arkansas Corporation Commission to Pulaski Circuit Court, within thirty days after the entry on the record of the said Arkansas Corporation Commission of any order made by it, any party aggrieved may file a written motion with any member of such commission or with the secretary thereof praying for appeal from such order to the Circuit Court of Pulaski County; and thereupon said appeal shall be automatically deemed as granted as a matter of right without any further order. The secretary of said Commission shall then at once make full and

complete transcript of all proceedings had before such Commission in such matter and of all evidence before it in such matter; including all files therein, and deposit same forthwith in the office of the clerk of said Circuit Court, which appeal shall be given preference over all other cases on the docket of said circuit court.

Upon the filing of the aforesaid motion of said appeal and at any time thereafter the said circuit court or its Circuit Judge shall have the right to issue such temporary or preliminary orders as to it or him may seem proper until final decree is rendered.

Section 2020: "Appeal to the Supreme Court, within thirty days after rendition of any order of any Circuit Court under the terms of this act, whether such order be rendered on appeal of municipal council or city commission action or Arkansas Corporation Commission action, any party aggrieved may file a motion in writing in said Circuit Court or in the office of the clerk thereof, praying an appeal from such order to the Supreme Court of Arkansas, which motion when so filed shall be granted as a matter of right by the said Circuit Court or by the clerk thereof; and in such case, the appeal to the Supreme Court shall be governed by the procedure, and reviewed in the manner applicable to other appeals from such Circuit Court, except that any finding of fact by the Circuit Court shall not be binding on the Supreme Court, but the Supreme Court may and shall review all the evidence and make such findings of fact and law as it may deem just, proper and equitable.

The record shall be lodged in the office of the clerk of the Supreme Court within sixty days from the rendition of the order in the Circuit Court, and all such cases shall be regarded and treated in the Supreme Court as cases involving public interest and shall be advanced and given preference on the docket of said court on motion of either party."

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CHARLES ELMORE GANLEY
CLERK

Supreme Court of the United States

ARKANSAS CORPORATION COMMISSION, _____ *Petitioner,*

v.

No. 715

GUY A. THOMPSON AS TRUSTEE OF MISSOURI
PACIFIC RAILROAD COMPANY, DEBTOR, _____ *Respondent.*

BRIEF IN BEHALF OF THE STATE OF ARKANSAS

✓
JACK HOLT,
Attorney General of the
State of Arkansas,
Amicus Curiae.

✓
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WALTER G. RIDDICK,
Of Counsel.

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STATUTE

Pope's Digest, Section 2019

Supreme Court of the United States

ARKANSAS CORPORATION COMMISSION,.....*Petitioner,*

v.

No. 715

GUY A. THOMPSON AS TRUSTEE OF MISSOURI
PACIFIC RAILROAD COMPANY, DEBTOR,.....*Respondent.*

BRIEF IN BEHALF OF THE STATE OF ARKANSAS

ARKANSAS CORPORATION COMMISSION,.....*Petitioner,*

v.

GUY A. THOMPSON AS TRUSTEE OF MISSOURI
PACIFIC RAILROAD COMPANY, DEBTOR,.....*Respondent.*

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

Four trunk line railroads which traverse the State of Arkansas are in reorganization proceedings under section 77 of the bankruptcy act. The State and many of its subdivisions have tax claims against each of them, and the State is vitally interested in the questions involved in this case. For this reason I ask leave to file the accompanying brief in behalf of the State as amicus curiae, pursuant to Supreme Court Rule No. 27, paragraph 9.

Respectfully submitted,

JACK HOLT,
*Attorney General of the
State of Arkansas.*

POINTS AND AUTHORITIES RELIED ON

I.

*Jurisdiction of the Bankruptcy Court.**Hennepin County v. Savage*, 83 Fed. (2d) 453 (C.C.A. 8)*Thompson v. Louisiana*, 98 Fed. (2d) 108 (C.C.A. 8)*Böteler v. Ingels*, 308 U.S. 57, 521*Robertson v. Goree*, 29 Fed. (2d) 261, (C.C.A. 5)*Macgregor v. Johnson-Cowdin*, 39 Fed. (2d) 574
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*Road Improvement District v. St. Louis-San Francisco
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Paving District v. Myer, 158 Ark. 610

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Baker v. Druesdow, 263 U.S. 137

S.C. 44 Sup. Ct. 42

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Virginia Railway Co. v. United States, 272 U.S. 658

S.C. 47 Sup. Ct. 222

United States v. New River Company, 265 U.S. 533

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*Western Paper Maker's Chemical Company v. United
States*, 271 U.S. 268

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S.C. 42 Sup. Ct. 239

Voehl v. Indemnity Insurance Co., 288 U.S. 162

S.C. 52 Sup Ct. 380

ARGUMENT

I.

Jurisdiction of the Bankruptcy Court.

The jurisdiction of a bankruptcy court in a railroad reorganization proceeding does not stem from section 64a of the bankruptcy act. This question was fully discussed in the supplemental brief in support of the petition for a writ of certiorari, and the argument need not be repeated here.

Taxes which accrue during the pendency of bankruptcy proceedings are a part of the expense of administration.

Hennepin County v. Savage, 83 Fed. (2d) 453
(C.C.A. 8)

Thompson v. Louisiana, 98 Fed. (2d) 108
(C.C.A. 8)

Boteler v. Ingels, 308 U.S. 57, 521

Robertson v. Goree, 29 Fed. (2d) 261 (C.C.A. 5)

Macgregor v. Johnson-Cowdin, 39 Fed. (2d) 574
(C.C.A. 2)

In re Humeston, 83 Fed. (2d) 187 (C.C.A. 2)

It is the duty of the bankruptcy court to make an order allowing or disallowing such tax claims filed against the debtor's property. It cannot discharge this duty without determining the validity or invalidity of the tax claims, and it has unquestioned jurisdiction to do this.

The crux of this case is not the question of the power of the court to pass on the validity of a tax claim, but the question of the principles of law which should govern the court in determining its validity.

The trustee contends that section 64a of the bankruptcy act empowers the court to re-assess the tax and reduce it if the court thinks that it is too high. It is with this in view that the trustee contends that section 64a is a part of section 77. The position of the State of Arkansas is that the court may disallow the tax claim if it finds, in accordance with applicable legal principles, that it is invalid, but that the court cannot itself determine what the proper amount of the tax ought to be.

The purpose of this brief is to discuss the principles according to which the validity of the tax claim should be adjudicated.

II.

The Validity and Amount of Tax Claims Must be Determined in Accordance with the Laws of the Taxing Sovereignty.

This is a universal principle with reference to which there is practically no dissent in the authorities. It applies to bankruptcy proceedings just as it does in all other proceedings. It is bottomed on the sovereign power of the states in taxation matters. If a tax is valid according to the law of the state pursuant to which it is levied, it is valid in whatever jurisdiction, state or federal, its validity is called in question. It has been held that this principle applies even under section 64a.

In re 168 Adams Building Corporation, 105 Fed. (2d) 704, (C.C.A. 7)

Dickinson v. Riley, 86 Fed. (2d) 385 (C.C.A. 8)

In re Gustav Schaefer Company, 103 Fed. (2d) 237 (C.C.A. 6)

It becomes necessary to ascertain, therefore, what the laws of Arkansas are.

III.

The Arkansas Corporation Commission is a Quasi Judicial Tribunal.

Under the laws of Arkansas the commission is a *quasi judicial* tribunal, to which the legislature has committed exclusive jurisdiction to assess taxes due by railroad companies, after notice and with an opportunity to appear and be heard. An assessment of taxes by the commission has the force and effect of a judgment.

"The board was created for the purpose of using its judgment and its knowledge. Within its jurisdiction, except, as we have said in the case of fraud or clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection, and has trusted to its honor and capacity, as it confides the protection of other social relations to the courts of law."

Chicago B. & Q. R.R. v. Babcock, 204 U.S. 585.

The judicial quality of such tribunals has given rise to the established principle that their decisions cannot be overturned by the courts for mere mistakes of fact or errors of judgment. This principle applies to all *quasi judicial* tribunals.

King v. M'Andrews, 111 Fed. 860 (C.C.A. 8)

Smelting Company v. Kemp, 104 U.S. 636

Butte A. & P. Ry. Co. v. U.S., 290 U.S. 127

Chicago Railway v. Kendall, 266 U.S. 94

Oregon Short Line R.R. v. Ross, 52 Fed. (2d) 697

Taylor v. Secor, 92 U.S. 575

Southern Ry. Co. v. Watts, 260 U.S. 519

IV.

*The Trustee did not Exhaust the Administrative Remedy
Provided by the Arkansas Statute.*

The applicable Arkansas statute is as follows:

"Appeal from Arkansas Corporation Commission to Pulaski Circuit Court. Within thirty days after the entry on the record of the said Arkansas Corporation Commission of any order made by it, any party aggrieved may file a written motion with any member of such commission or with the secretary thereof praying for appeal from such order to the circuit court of Pulaski County; and thereupon said appeal shall be automatically deemed as granted as a matter of right without any further order. The secretary of said commission shall then at once make full and complete transcript of all proceedings had before such commission in such matter and of all evidence before it in such matter, including all files therein, and deposit same forthwith in the office of the clerk of said circuit court, which appeal shall be given preference over all other cases on the docket of said circuit court. Upon the filing of the aforesaid motion of said appeal and at anytime thereafter the said circuit court or its circuit judge shall have the right to issue such temporary or preliminary orders as to it or him may seem proper until final decree is rendered."

Pope's Digest, Section 2019.

It is a universal principle that a tax-payer must exhaust the administrative remedy afforded by law to secure relief

against an alleged illegal tax before he can resort to the courts for that purpose.

Coulter v. Railroad, 196 U.S. 599

Pittsburgh Railway v. Backus, 154 U.S. 431

Tagg Brothers v. United States, 280 U.S. 420

First National Bank v. Commissioners, 264 U.S. 308

Hodge v. County, 196 U.S. 276

Branson v. Bush, 251 U.S. 191

Kansas City Ry. Co. v. District, 266 U.S. 379

Denver Union Stock Yard Co. v. United States,
57 Fed. (2d) 738

Apartments Building Company v. Smiley, 32 Fed.
(2d) 142

Kansas City Southern v. Levee District, 15 Fed.
(2d) 637

Robert Noble Estate v. Boise City, 19 Fed. (2d)
928

Union Pacific R.R. Co. v. Commissioners, 217 Fed.
540

Thomas v. Railway, 277 Fed. 708.

The principle that the property owner must exhaust the administrative remedy provided by law for relief against an alleged illegal tax before he can resort to the courts for that purpose has been held to be applicable to trustees in bankruptcy.

In re Gustav Schaefer Company, 103 Fed. (2d) 237
(C.C.A. 6)

City of Springfield v. Hotel Charles, 84 Fed. (2d)
589 (C.C.A. 1)

In re Perlmutter, 256 Fed. 861

In re 168 Adams Building Corporation, 105 Fed. (2d) 704 (C.C.A. 7)

In re A. V. Manning's Sons, 16 Fed. Supp. 932

In re Schach, 17 Fed. Supp. 437

The trustee in the case at bar, instead of exhausting the administrative remedy which presumably would have afforded him any relief that he was entitled to, filed a petition in the bankruptcy court for the bar order involved. He alleged that the court had jurisdiction under section 64a, and he asked the court, not to set aside the assessment made by the commission on the ground that it was excessive and invalid, but to determine as an original proposition what the amount of the tax ought to be.

The district court, in a written opinion filed by it, (record pages 29-34) stated that it was admitted in this case that the trustee did not take an appeal from the Arkansas Corporation Commission to the circuit court of Pulaski county, the administrative remedy provided by section 2019 of *Pope's Digest*, but the court held that the trustee was not required to exhaust this statutory remedy. The court said:

"The court is of the opinion that this right of appeal granted by the Arkansas statute does not preclude the Trustee from petitioning this court to determine the amount and validity of the disputed tax under the provisions of section 64a of the bankruptcy act." (Record 33)

The court ordered the trustee to pay 60% of the taxes as assessed, the amount conceded by him to be due, and to withhold the payment of the other 40% "pending determination by this court of the amount and legality of the taxes

assessed against the property of the Trustee in said respective counties for the year 1939." (Record 21)

This order was affirmed by the Circuit Court of Appeals. The affirmance not only raises the question whether or not a trustee in bankruptcy is required to exhaust an administrative remedy provided by law, like an ordinary property owner, but the further and more vital question whether a court of bankruptcy has any power under the federal constitution to assess values for taxation purposes, or to itself determine what the amount of a tax ought to be.

V.

The Bankruptcy Court has no Power, Under Section 77, to re-assess the Taxes due by the Trustee.

The entire scope and effect of section 77 is to authorize the creditors and stockholders of a railroad company to formulate a reorganization plan, subject to the approval of the interstate commerce commission and of the court, that will be fair and just to the creditors and stockholders, and which will guarantee the continued operation of the railroad. The word "taxes" does not appear in section 77, and there is not a single sentence in the section which remotely indicates that Congress intended to confer on bankruptcy courts the extraordinary power to assess or reassess taxes.

If a tax is valid when measured by the laws of the taxing sovereign the bankruptcy court should allow it. If a tax is invalid when measured by those laws, it is the duty of the bankruptcy court to disallow it. The allowance or disallowance of a tax claim exhausts the entire judicial power of the court. The court cannot in a bankruptcy case, any more than it can in any other character of case, re-assess a tax.

If there is one outstanding principle that has been established by this court it is that a federal court is wholly without power to make assessments of taxes. The assessment of taxes is referable to the legislative power, and it is no part of the judicial function. This is true, as said by this court, "both because that is a function reserved to the states, and because it is not one within the judicial power conferred upon them by the constitution."

Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U.S. 264

S.C. 54 Sup. Ct. 154

See also:

West Ohio Gas Company v. Public Utilities Commission, 294 U.S. 63

S.C. 55 Sup. Ct. 316

Rowley v. Chicago & N.W. Ry Co., 293 U.S. 102

S.C. 55 Sup. Ct. 55

Great Northern Ry. Co. v. Weeks, 297 U.S. 136

S.C. 56 Sup. Ct. 435

Reagan v. Farmers Loan & Trust Company, 154 U.S. 362

West v. Chesapeake and Potomac Tel. Co., 295 U.S. 662

S.C. 55 Sup. Ct. 894

Central R. Company v. Martin, 115 Fed. (2d) 968, (C.C.A. 3)

This principle has been held to be applicable to tax claims filed in bankruptcy proceedings.

City of Detroit v. Detroit & Canada Tunnel Co., 92 Fed. (2d) 833 (C.C.A. 6)

Cross v. Georgia Iron & Coal Co., 250 Fed. 438

In Re Gould Manufacturing Company, 11 Fed. Supp. 644

In re Schach, 17 Fed. Supp. 437

In re 168 Adams Building Corporation, 27 Fed. Supp. 247

All of the foregoing principles and decisions would go for naught if it should be held, as the Circuit Court of Appeals held, that section 64a is a part of section 77, and it should further be held, as contended by the trustee, that under 64a the bankruptcy court has the power to itself determine what the amount of the tax ought to be.

The trustee relies on *Henderson County v. Wilkins*, 43 Fed. (2d) 670 (C.C.A. 4)

This case is out of line with all the bankruptcy cases heretofore cited to the effect that the validity and amount of a tax assessment must be determined by the laws of the taxing sovereign. The claim involved in that case was an *ad valorem* tax on real estate. The court found that the tax assessed by the taxing authorities was too high, and it reduced it to what the court thought it ought to be.

The court based its opinion on *New Jersey v. Anderson*, 203 U.S. 483. The *Anderson* case has been more misunderstood than perhaps any other bankruptcy decision.

A statute of New Jersey levied a "license fee" on the stock of corporations. The assessment was made on the basis of \$40,000,000.00 of authorized capital stock, whereas it was undisputed that only \$10,000,000.00 was issued and outstanding. The court said that the case turned on whether

the imposition was in legal effect a license fee or a tax, and that the nomenclature used in the statute was not conclusive of that question. If the imposition was a license fee, it could legally be levied on the entire authorized capital stock of the corporation. If, on the other hand, it was in reality a tax, it could only be levied on the outstanding stock. This for the obvious reason that a tax cannot be levied on something that does not exist. A majority of the judges construed the imposition as a tax, and held that it only applied to the capital stock which had been issued and which was outstanding. The chief justice and two associate justices took the view that the imposition was a license fee imposed on corporations for the privilege of doing business in New Jersey.

The court stated the specific question which it was called on to decide as follows:

"The question is, is the claim a tax legally due and owing to the State of New Jersey? We have been cited to many cases in the State of New Jersey, some of which it is alleged maintain the theory of the appellant that this is a tax, and some the contrary view."

An analysis of the *Anderson* case, therefore, demonstrates that it is not susceptible of the interpretation put on it in *Henderson County v. Wilkins*. This has been pointed out by other courts.

In re Gould Manufacturing Company, 11 Fed. Supp. 644

In re Schach, 17 Fed. Supp. 437

In re 168 Adams Building Corporation, 27 Fed. Supp. 247

VI.

Trustee's Petition is a Collateral Attack on the Assessment made by the Commission.

One of the reasons why the trustee insists so strenuously that section 64a is a part of section 77, and that the bankruptcy court has the power to determine the amount of the assessment without remitting that question to the commission, is to escape the principles which are applicable to a collateral attack on the assessments. Some of the principles are as follows:

(a)

The assessment is prima facie valid.

The findings of *quasi judicial* tribunals, such as the Arkansas Corporation Commission, are presumed to be valid, and the burden of proof is on those who assail their validity.

Kansas City Southern Ry. Co. v. Road Improvement District, 266 U. S. 379

S.C. 45 Sup. Ct. 136

Memphis L. & T. Co. v. St. Francis Levee District,
64 Ark. 259

Missouri Pacific R. Co. v. Improvement District,
137 Ark. 568

Overstreet v. Levee District, 80 Ark. 462

Paving District v. Meyer, 158 Ark. 610

(b)

The validity of the assessment must be determined on the record before the commission.

It is established, with practical unanimity, that the validity of a finding or judgment of a *quasi judicial* tribu-

nal when challenged in the courts must be determined on the evidence which was introduced before the tribunal. Any other rule would make a mockery of the laws creating such tribunals and investing them with exclusive jurisdiction of the matters confided to their determination.

Louisville & Nashville Railway Co. v. U.S., 245 U.S. 463, 466

State of Florida v. United States, 292 U.S. 1

S.C. 54 Sup. Ct. 608

Chicago, I. & L. Ry. Co. v. United States, 270 U.S. 287

- *S.C.* 46 Sup. Ct. 227.

Nashville, C. & St. L. Ry. v. State of Tennessee, 262 U.S. 318

S.C. 43 Sup. Ct. 583

Louisiana P.B. Ry. Co. v. United States, 257 U.S. 114

S.C. 42 Sup. Ct. 25

Spiller v. Atchison T. & S.F. Ry. Co., 253 U.S. 125.

Tagg Bros. & Moorehead v. United States, 280 U.S. 420

S.C. 50 Sup. Ct. 220

Department of Public Works v. United States, 55 Fed. (2d) 395

Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 148.

S.C. 44 Sup. Ct. 72

Louisiana P. B. Railway Co. v. United States, 257 U.S. 114, 116

S.C. 42 Sup. Ct. 25

(c)

An assessment made by a quasi judicial tribunal cannot be set aside for mere mistakes of facts or errors of judgment.

If there is one proposition that is more thoroughly settled than others by the decisions of the Arkansas Courts it is that an assessment made by a duly constituted tribunal, like the Arkansas Corporation Commission, cannot be set aside on evidence merely showing that the assessment is excessive. The proof must go very much further. It must clearly and convincingly be made to appear, as said by the Supreme Court of Arkansas, that the assessment was "manifestly outside of the range of the facts so as to amount to an arbitrary abuse of power."

Salmon v. Board of Directors, 100 Ark. 366

Moore v. Board of Directors, 98 Ark. 117

Board of Directors v. Crawford County Bank, 108 Ark. 419

Road Improvement District v. St. Louis-San Francisco Ry. Co., 164 Ark. 442

Paving District v. Myer, 158 Ark. 610

Withrow v. Nashville, 145 Ark. 345

The federal decisions are to the same effect.

Baker v. Druesedow, 263 U.S. 137

S.C. 44 Sup. Ct. 42

Rowley v. Chicago & N.W.R. Co., 293 U.S. 102

S.C. 55 Sup. Ct. 55

Lehigh Valley R. Co. v. Martin, 100 Fed. (2d) 139

Fallbrook Irrigation District v. Bradley, 164 U.S.

Great Northern Ry. Co. v. Weeks, 77 Fed. (2d) 405, (C.C.A. 8)

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38

S.C. 56 Sup. Ct. 720

In Re Lang Body Co., 92 Fed. (2d) 338, (C.C.A. 6)

In Re 168 Adams Building Corporation, 105 Fed. (2d) 704, (C.C.A. 7)

(d)

Judicial function.

“The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.”

Mississippi Valley Barge Line v. United States, 292 U.S. 282

S.C. 54 Sup. Ct. 694

Virginia Railway Co. v. United States, 272 U.S. 658

S.C. 47 Sup. Ct. 222

United States v. New River Company, 265 U.S. 533.

S.C. 44 Sup. Ct. 610

Western Paper Makers' Chemical Company v. United States, 271 U.S. 268

S.C. 46 Sup. Ct. 501

Louisville & Nashville Railway Co. v. United States, 225 Fed. 571, 582

Great Northern Railway Company v. Weeks, 77 Fed. (2d) 405 (C.C.A. 8.)

State of Florida v. United States, 292 U.S. 1.

S.C. 54 Sup. Ct. 608

*Chicago, Rock Island & Pacific Railway Co. v.
United States*, 274 U.S. 29

S.C. 47 Sup. Ct. 486

New York v. United States, 257 U.S. 591, 601

S.C. 42 Sup. Ct. 239

Voehl v. Indemnity Insurance Co., 288 U.S. 162

S.C. 52 Sup. Ct. 380

VII.

Conclusion.

It will be conceded that the principles discussed in this brief would be controlling if this were an ordinary suit in equity by the Missouri Pacific Railroad Company against the Arkansas Corporation Commission and the 51 county collectors to annul the assessment and to enjoin the collection of the taxes based on it. The trustee takes the position, however, that none of them are applicable to this case because, as he contends, section 64a is a part of section 77, and that section 64a, as construed in *Henderson County v. Wilkins*, 43 Fed. (2d) 670, (C.C.A. 4) absolves trustees in railroad reorganization proceedings from the dominion of state laws and state decisions, and invests courts of bankruptcy with the legislative power of assessing for themselves, on original evidence introduced before them, the value of railroad property for taxation purposes, and of determining the amount of the tax to be paid on such value.

The questions involved are of great public importance in view of the many railroad reorganization proceedings now pending in the courts, and they ought to be authoritatively settled.

Respectfully submitted,

JACK HOLT,

*Attorney General of the
State of Arkansas,*

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CHARLES T. COLEMAN,

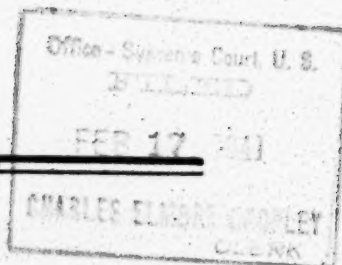
WALTER G. RIDDICK,

Of Counsel.

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**IN THE
SUPREME COURT OF THE UNITED STATES.**

**THE ARKANSAS CORPORATION COMMISSION and FIFTY-ONE COUNTY
TAX COLLECTORS OF ARKANSAS,**
Petitioners,

vs.

**GUY A. THOMPSON, as Trustee of
MISSOURI PACIFIC RAILROAD
COMPANY, Debtor,**

Respondent.

No. 715.

**BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR CERTIORARI.**

**RUSSELL L. DEARMONT,
THOMAS T. RAILEY,
HARVEY G. COMBS,
JAMES M. CHANEY,**

**Counsel for Guy A. Thompson,
Trustee, Respondent.**

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Respondent.

No. 715.

**BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR CERTIORARI.**

STATEMENT.

As will appear from the transcript, petitioners are seeking certiorari to the Circuit Court of Appeals for the Eighth Circuit to review a judgment of that Court affirming an interlocutory order of the District Court of the United States for the Eastern District of Missouri overruling a motion filed by the Arkansas Corporation Commission, on behalf of itself and the County Collectors, to dismiss a petition filed in said District Court by Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, Debtor, in which said Trustee prayed said Court to hear and determine the amount and legality of taxes assessed against Trustee's property in the State of Arkansas for the year 1939.

As stated in the petition herein, the Missouri Pacific Railroad Company was, and is, under reorganization in a proceeding previously filed in said District Court, under the provisions of Section 77 of the amended Bankruptcy Act; and Guy A. Thompson was and is the duly appointed and qualified trustee in said proceeding.

On April 11, 1940, said Trustee filed in said District Court a petition alleging that certain questions had arisen with respect to taxes for the year 1939 assessed against the property of the trust estate in the State of Arkansas and prays said Court to hear and determine the amount and legality of said taxes, under the provisions of Section 64 of the Federal Bankruptcy Act.

The Trustee's petition alleges that the taxes assessed against his property in Arkansas are excessive and illegal in several particulars, viz.:

1. In paragraph 4 (R. 7), that the Statutes of Arkansas require all property assessed by the Arkansas Corporation Commission, including railroad property, to be assessed on the basis of its fair market value, i. e. (Section 2044, Pope's Digest of Arkansas Statutes, 1937), "upon the consideration of what a clear fee simple title thereto would sell for under conditions under which that character of property is usually sold," but that (paragraph 2, R. 9) the assessment set by the Arkansas Corporation Commission upon Trustee's properties in that State, in the sum of \$28,050,000, was (paragraph 10, R. 13) greatly in excess of a maximum proper assessment thereof for said year 1939, which should not exceed the sum of \$16,830,000.

The petition further alleged, in paragraphs 8 and 9 (R. 11-13) that said excessive assessment was due to the use by the Arkansas Corporation Commission of improper methods in arriving at the System value of the Trustee's

property in that too great weight was ascribed to original cost and to cost of reproduction of the property, and to an indefinite factor described as Gross Revenue, the source of which could not be determined and inadequate weight to market value of stocks and bonds and to capitalized net earnings, thereby ignoring the general collapse of values which has taken place in all properties, including railroad properties, since 1929, and also ignoring the virtual collapse of railroad values due to increased carrier competition (paragraph 13a, R. 17).

The foregoing allegations of a violation in the assessment of the requirement of the Arkansas statute that railroad property be assessed upon the basis of its true market value, although making up by far the greatest part of the Trustee's petition, are wholly ignored in the "Summary Statement of the Case" in the Petition for Writ of Certiorari filed herein.

2. The petition alleges (paragraph 13b, R. 18) that the assessment was in violation of Section 5 of Article XVI of the Constitution of Arkansas, which provides that all property shall be taxed according to its value and that no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, and that all values shall be ascertained so as to make same equal and uniform throughout the State, and also

3, in paragraph 13 (b) (R. 18), that by reason of arbitrary discrimination, over a long period, and assessment of the Trustee's properties for 1939 and for many years prior thereto at more than their full and actual value, after giving consideration to an equalization factor of the same amount as that applied to other classes of property in the State, there was imposed upon the Trustee so undue and disproportionate a share of the taxes in said State as

to amount to a constructive fraud and to deprive the Trustee of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Trustee's petition also prayed, in paragraph 14 (R. 19), that he be authorized to pay or to tender payment to the several County Collectors of taxes in amount conceded to be due under a proper assessment, amounting to \$620,645.03, and that the Court proceed, without unnecessary delay, to determine the legality of the taxes in dispute, amounting to \$416,043.17, and that pending such determination he be authorized to withhold payment of said amount in dispute.

Upon the filing of the Trustee's petition, the District Court, on April 11, 1940, entered its order (R. 20-25) assigning the case for hearing on May 3, 1940, and directing the manner in which notice should be given to the Attorney-General for the State of Arkansas, to each member of the Arkansas Corporation Commission, and to each of the County Collectors of the fifty-one Counties in Arkansas in which taxes against the property of the Trustee had been levied for the year 1939.

The order also authorized the Trustee to pay the amount of taxes conceded to be due for 1939 (\$620,045.03), on the installment dates as provided in the Arkansas statute, and to withhold payment of any additional taxes for said year, based on the assessment made by the Arkansas Corporation Commission, pending the determination by the Court of the amount and legality thereof.

No appearance was made on May 3, 1940, the return day fixed in the Court's order, but on July 5, 1940, the Arkansas Corporation Commission, on behalf of itself and the fifty-one Tax Collectors, filed a motion to dissolve the Court's order of April 11, 1940, and to dismiss the Trustee's petition (R. 25-34).

The grounds as set forth in said motion were generally the same as those asserted in the petition for writ of certiorari now before this Court, except that an additional ground asserted in their original motion in the District Court, that the Trustee's petition failed to allege that he had exhausted his administrative remedy before seeking judicial relief (R. 32) has since been abandoned.

Following oral argument upon said motion and submission of briefs, the District Court, on September 24, 1940, entered its order overruling said motion (R. 40), accompanied by an opinion (R. 34-39).

The District Court therein expressed no opinion upon the merits of the case, other than that the Trustee's petition presented a justiciable controversy.

Before any order of reference was made, or any other action taken by the District Court, the Arkansas Corporation Commission and the fifty-one County Collectors prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit. On January 3, 1941, that Court entered its judgment affirming the interlocutory order of the District Court (R. 51-52), accompanied by an opinion (R. 44-51).

In the present petition for writ of certiorari, petitioners seek review of said judgment of the Court of Appeals.

At page 3 of their petition, under "Summary Statement of the Case," Counsel for Petitioners refer to the provisions of Section 2044 of the Arkansas Statutes (Pope's Digest, 1937). The reference is incomplete and decidedly misleading, and because this section has an important bearing upon the method prescribed by the Arkansas Statute for determining the true market value of the property, we quote said section in full, as follows:

"Section 2044. VALUATION; EVIDENCE. The valuation of the property of all persons, firms, companies, co-partnerships, associations and corporations

required by law to be assessed by the Commission shall be made upon the consideration of what a clear fee simple title thereto would sell for under conditions under which that character of property is usually sold. As evidence tending to show what this would be the Commission, in so far as other evidence and information in its possession does not make it appear improper or unjust for it to do so, shall ascertain as nearly as it can and consider the market or actual value of all outstanding capital stock and funded debt and the income of such companies, and also the estimated investments and valuation of said property as set up by the officers or agents of such companies as a basis for the adjustment of rates or charges for service to the public by such companies, and such other information as to value the Commission may obtain."

It will be observed that Counsel for Petitioners omit entirely the provision of the statute that the Commission, "in so far as other evidence and information in its possession does not make it appear improper or unjust for it to do so, shall ascertain as nearly as it can and consider * * *" (among other things) "the estimated investments and valuation of said property as set up by the officers or agents of such companies as a basis for the adjustment of rates or charges for service * * *."

Paragraph 13 (a) of the Trustee's petition alleges that the general business conditions, the material reduction in value of all classes of property and the virtual collapse of values of railroad properties due to increased competition, which rendered original cost of the railroad property an improper determinant of the true market value thereof, were well known to the Corporation Commission.

POINTS AND AUTHORITIES.

A. The petition for certiorari should be denied because the grounds therefor, as set forth in the petition, are without merit.

It will be observed that the argument, in the Brief in support of the writ, does not at all follow the order of the "Statement of Questions Presented," as set forth at page 8 of the Petition for Writ of Certiorari. We will follow the order of the latter.

1. The power conferred on courts of bankruptcy by Section 64a (11 U. S. C. A. 104) applies to taxes which accrue during the pendency of the proceeding as well as to taxes which accrued against the bankrupt prior to its adjudication as a debtor.

Prior to the amendment of the Bankruptcy Act, by the Act of June 22, 1938, it has been repeatedly held that Section 64a applies to taxes accruing while the Trustee was in possession, as well as to taxes accruing prior to the adjudication.

Henderson County v. Wilkins, 43 Fed. (2nd) 670;

Dickinson v. Riley, 86 Fed. (2nd) 385;

Board of Directors of St. Francis Levee District v. Kurn, 91 Fed. (2nd) 118 (Certiorari denied, 302 U. S. 750);

Board of Directors of St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394 (Certiorari denied, 305 U. S. 647).

The Amendment of the Bankruptcy Act, by the Act of June 22, 1938, does not change the classification of taxes accruing during the Trustee's possession as part of the cost and expense of administration. Consequently the cases above cited apply with equal force to taxes accruing

after the effective date of the 1938 Amendment and during the Trustee's possession.

And Section 64a, as same appears in the 1938 Amendment, specifically provides that "in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court" (meaning the Bankruptcy Court). 52 Stat. 874.

"Where a statute that has been construed by the courts of last resort has been re-enacted in same, or substantially the same, terms, the legislature is presumed to have been familiar with the construction, and to have adopted it as a part of the law, unless a contrary intent clearly appears or a different construction is expressly provided for."

59 *Corpus Juris*, "Statutes," Sec. 625, pages 1061-1063;

Heald v. District of Columbia, 254 U. S. 20, l. c. 23;

Johnson v. Manhattan Ry. Co., 289 U. S. 479, l. c. 500.

2. Section 64a of the Bankruptcy Act is a part of Section 77 of that Act and is applicable to a railroad reorganization proceeding.

Bankruptcy Act, Section 64a, 52 Stat., page 874;

Bankruptcy Act, Section 77, paragraph (1), 49 Stat., page 922;

Bankruptcy Act, Chapter X, Section 102, 52 Stat., page 883;

Continental Illinois National Bank & Trust Co. v. C. R. I. & P. Ry. Co., 294 U. S. 648;

Board of Directors of St. Francis Levee District v. Kurn, 91 Fed. (2nd) 118 (Certiorari denied, 302 U. S. 750);

Board of Directors of St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394 (Certiorari denied, 305 U. S. 647).

3. An appeal to the Bankruptcy Court to hear and determine the amount or legality of the disputed taxes, under the provisions of Section 64a of the Bankruptcy Act, such as the petition of the Trustee in the present proceeding, is not prohibited by Section 24 of the Judicial Code as amended (28 U. S. C. A. 41).

The Trustee's petition does not ask an injunction, nor does the order of the District Court enjoin the State taxing authorities in any respect whatever.

Henderson County v. Wilkins, 43 Fed. (2nd) 670.

Jurisdiction, in the appeal to the Bankruptcy Court to hear and determine the amount or legality of the disputed taxes is not based upon any of the grounds specified in Section 24 of the Judicial Code, but is based upon Section 64a of the Bankruptcy Act.

Even though an adequate remedy might be provided in the State Courts (which is denied) "the Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor, who duly invokes the bankruptcy law."

Kalb v. Feuerstein, 308 U. S. 433;

New York v. Irving Trust Co., 288 U. S. 329;

Ex Parte Baldwin, 291 U. S. 610.

4. The petition of the Trustee as filed in the Bankruptcy Court presents a justiciable controversy.

It alleges that the assessment made by the Arkansas Commission is based upon a value of the System greatly in excess of the true market value thereof and, therefore, in violation of the Arkansas Statutes.

Sections 2044 and 2048, *Pope's Digest of Arkansas Statutes*, 1937;

Henderson County v. Wilkins, 43 Fed. (2nd) 670,
l. c. 671;

In re Gustav Schaefer Co., 103 Fed. (2nd) 237, l. c. 241;

Board of Directors of St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394, l. c. 397.

It alleges that the assessment is in violation of the uniformity clause of the Constitution of Arkansas.

Article XVI, Section 5, Arkansas Constitution;
Dawson v. Kentucky Distilleries and Warehouse Co.,
255 U. S. 288.

It alleges that the over-assessment of Trustee's properties in Arkansas has been persistent and material, and has imposed upon the Trustee so undue and disproportionate a share of the taxes in said State as to amount to a constructive fraud and to deprive the Trustee of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U. S. 658;

Road Improvement District No. 1 v. Missouri Pacific Railroad Co., 274 U. S. 188.

B. The petition for certiorari should be denied because the granting of such writ is solely a matter of sound judicial discretion and the facts presented do not bring this case within the classes of cases calling for the exercise of such discretion, as set forth in paragraph 5 of Rule 38 of the Rules of this Court.

Furthermore, the decision of the United States Circuit Court of Appeals merely affirms an interlocutory order of the District Court, and, except in extraordinary cases, this writ will not be issued until final decree.

American Construction Co. v. Jacksonville, Tampa and Key West Railway Co., 148 U. S. 372;

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, l. c. 259.

ARGUMENT.

A. 1. The Power Conferred on Courts of Bankruptcy by Section 64a (11 U. S. C. A. 104) Applies to Taxes Which Accrue During the Pendency of the Proceeding as Well as to Taxes Which Accrued Against the Bankrupt Prior to Adjudication.

This is in reply to point (1) in "Statement of the Questions presented," on page 8 of the Petition for Certiorari. Petitioners' argument on this question is presented under heading 4, at pages 12-14 of the brief filed in support of their petition.

With respect to the case of *Hennepin County v. Savage*, 83 Fed. (2nd) 453, cited at page 12 of Petitioners' brief, it will be observed that the question at issue was solely the obligation of the Trustee to pay, as cost of administration, taxes which had accrued upon property which the Trustee had used and occupied during the time he held same, and for which he had paid no rental, nor had he paid interest upon a mortgage upon the property. When he had no further use of the property, after having occupied same for several years, the Trustee alleged that the estate had no equity in the property and sought to escape payment of taxes which had accrued during his occupancy, under another provision of Section 64a, "that no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the Court." The mortgagee in the *Savage* case asked the Court to order the Trustee to secure release of the lien for the taxes, on property so occupied, which had accrued during the Trustee's occupancy. No question as to the amount of these taxes was involved at all, nor did either of these cases involve the provision of Section 64a

that "in case any question arises as to the amount or legality of any tax, such question shall be heard and determined by the Court." Manifestly, this decision has no bearing whatever upon the question now at issue. The Court held that "to escape the obligation to pay such taxes, a receiver must, within a reasonable time, repudiate the property as a burden upon the estate. He cannot accept the benefits and escape the burdens of operation."

The case of *Boteler v. Ingels*, 308 U. S. 57, cited at pages 13-14 of Petitioners' brief, involved a claim for penalties against the Trustee of a bankrupt creamery company for operating delivery trucks over the public highways without obtaining automobile license therefor within the period required by the State statute. The Trustee claimed exemption from liability for penalties by reason of Section 57j of the Bankruptcy Act. Section 57, in its entirety, relates to the proof and allowance of claims accruing against the bankrupt prior to adjudication, and the Court of Appeals for the Ninth Circuit held that paragraph j of this section did not exempt the trustee from penalties due from such trustee by reason of his having operated the trucks without a license, and further, that under the provisions of section 124a of the Judicial Code (48 Stat. 993, 28 U. S. C. A. 124a) the trustee was liable for all State and local taxes applicable to the business being conducted by the trustee the same as if such business were conducted by an individual or corporation. *Ingels v. Boteler*, 100 Fed. (2nd) 915. This holding by the Court of Appeals was in all respects affirmed by this Court.

In the case at bar there is no question as to the exemption of the Trustee from any taxes which would be due from the corporation—the sole question before the Court being whether the Bankruptcy Court is the proper tribunal to hear and determine the amount or legality of taxes

which are alleged to have been assessed improperly, in violation of the Constitution and of the Statutes of the State.

Section 64a of the Bankruptcy Act, in reliance upon which the Trustee originally filed his petition in the District Court, provides for the classification not only of claims accruing prior to the bankrupt's adjudication but also of claims against the Trustee—Class (1) of Section 64a being "the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition, * * *."

Counsel for petitioners argue, at page 13 of their brief, that "under the decision here, taxes which are operating expenses are no longer in a class of operating expenses but deferred to the fourth priority, * * *." In this statement, Counsel for petitioners are in error. Class (4) of Section 64a specifically refers to "taxes legally due and owing by the bankrupt" and it is our own view that taxes accruing while the Trustee is in possession of the property should be classed as a part of the necessary cost and expense of preserving the estate and, therefore, as a part of Class (1). This would appear to be the only possible conclusion from the language used by Mr. Justice Cardozo, in *Michigan v. Michigan Trust Co.*, 286 U. S. 334, at page 344, that "the annual taxes accruing while the receiver was in charge must be deemed expenses of administration and, therefore, charges to be satisfied in preference to the claims of general creditors."

But the fact remains that the claims in dispute are for taxes, and Section 64a specifically provides that "in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court"—and "the Court" has, in numerous cases, been held to mean the Bankruptcy Court. That Court finally

passes upon other claims for administration expense incident to the preservation of the estate, and, even apart from the express mandate of Section 64a, as above quoted, there is no reason to make an exception of disputed tax claims.

Prior to the amendment of the Bankruptcy Act by the Act of June 22, 1938 (52 Stat. 874), it had been repeatedly held that Section 64a, as it appeared in the former act (U. S. C. A., Title 11, Sec. 104) applied to taxes accruing while the Trustee was in possession, as well as to taxes accruing prior to the adjudication.

Thus, in *Henderson County, N. C., v. Wilkins*, 43 Fed. (2nd) 670, a decision by the Court of Appeals for the Fourth Circuit, the trustee in bankruptcy had complained of the assessed value, for ad valorem taxes, of a hotel property in his hands, and had petitioned the bankruptcy court to reduce same. The taxing authorities had assessed the property for taxation at a valuation of \$250,000. The valuation was reduced, upon a hearing before the referee in bankruptcy, to \$110,000.00, and the findings of the referee were approved and confirmed by the Bankruptcy Court. The action was affirmed, on appeal, by the Circuit Court of Appeals. In the opinion of that Court it is said (page 671):

"The first question raised by appellants is as to the power of the bankruptcy court to reduce the taxes assessed against the property in the hands of the trustee by the taxing officials of the county and municipality. We think, however, that there can be no doubt that the court has this power."

The opinion then quotes Section 64a of the Bankruptcy Act and proceeds as follows:

"Although the property in question was in the hands of the bankruptcy court when the taxes for

1927 and 1928 were levied, it was subject to taxation by the authorities of the county and municipality. *Swarts v. Hammer*, 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060; *Dayton v. Stanard*, 241 U. S. 588, 36 S. Ct. 695, 60 L. Ed. 1190. It was the duty of the county and municipal authorities, however, to tax it according to its true value in money. Constitution of N. C., Article V, Sec. 3; Code 1927, North Carolina, Sec. 7971 (46). And, when a question arose as to whether it had been properly valued for purposes of taxation or not, this was a matter for the determination of the bankruptcy court under the statute quoted above, as the question involved was one as to the amount of the tax to be paid from the estate. It is well settled that in determining such a question the court is not concluded by the findings of the taxing authorities. *New Jersey v. Anderson*, 203 U. S. 483, 493, 27 S. Ct. 137, 141, 51 L. Ed. 284; *Truman, Treas., v. Thalheimer* (C. C. A. 9th), 19 F. (2nd) 468; *In re Sheipman* (D. C.), 14 F. (2d) 323; *In re Simcox* (D. C.), 243 F. 479; *In re United Five and Ten Cent Store* (D. C.), 242 F. 1005. Its action is not a review of the action of the taxing authorities or a proceeding to enjoin action by them, but a determination under the statute of the amount which should be paid for taxes from the assets of the estate in its possession. *In re E. C. Fisher Corporation* (D. C.), 229 F. 316, 318."

And in *Dickinson v. Riley*, 86 Fed. (2nd) 385, there had been an adjudication of bankruptcy on January 8, 1932. The tax claims in controversy covered taxes for the years 1929-1933, inclusive, including two years during which the trustee was in charge of the property. The taxing authorities contended that the court of bankruptcy had no power or jurisdiction to go into the question of excessive valuation of the property taxed. While sustaining the original assessment, under the evidence in that case, the Court of Appeals held that the great weight of authority was in favor of the right of the bankruptcy court, by rea-

son of the provisions of Section 64a, to hear and determine whether the value at which the property was assessed was the proper and correct value as provided by the taxing statutes of the sovereignties or public entities which assessed and levied the taxes.

In *Board of Directors of St. Francis Levee District v. Kurn*, 91 Fed. (2nd) 118, the taxes involved were levied subsequent to the appointment of the trustees in a reorganization case under Section 77. The Bankruptcy Court had directed the trustees to apply for injunction, in the Federal Court in Arkansas, against the prosecution of several suits filed by the Levee District for the recovery of taxes claimed by it, in the State Courts in Arkansas. Interlocutory injunction was granted by the United States District Court in Arkansas and upon appeal said order was affirmed by the United States Court of Appeals for the Eighth Circuit. In its opinion in this case the Court of Appeals say (at page 120 of opinion): "The question of the amount and validity of the levee tax liens must be submitted to the bankruptcy court and settled by it."

The case last cited was decided by the Circuit Court of Appeals on June 28, 1937. On November 22, 1937, petition for certiorari in that case was denied by this Court. 302 U. S. 750, No. 543.

And in *Board of Directors of St. Francis Levee District v. Kurn*, 98 Fed. (2nd) 394, there was involved the same taxes as were at issue in the previous case of this same name (last cited) together with some additional taxes which had accrued while that case was pending. The Bankruptcy Court (United States District Court for the Eastern District of Missouri) had issued a bar order requiring the levee district board to present its claims for the taxes in question to that Court, in Missouri, within a reasonable time or be forever barred. Upon appeal, the

order of the District Court was in all respects sustained by the Court of Appeals, which said, 98 Fed. (2nd), at page 397:

"We think the issuance of its bar order by the Bankruptcy Court was the appropriate procedure to call upon the St. Francis Levee District to appear before the court and assert its rights by reason of its levy and assessment of levee taxes against the property then within the Court's exclusive jurisdiction."

In the case last cited, the precise contention which Petitioners are now asserting was urged upon the Court of Appeals. At page 27 of their brief in that case, Counsel for the St. Francis Levee District say:

"The taxes were not 'due and owing by the bankrupt.' They had not been levied or assessed at the time of the approval of the petition for reorganization proceedings. They were assessed at the instance of the trustees two years after their appointment.

"That the section quoted has no application to taxes levied and assessed and becoming due during the management of the bankrupt's property by the trustees seems to be established by prior decisions of this court."

But the decision of the Court was adverse to this contention.

The decision in this second St. Francis Levee District case was rendered on July 19, 1938. Certiorari was denied by this Court on November 14, 1938. 305 U. S. 647 (No. 415).

Now, all of the decisions above cited, excepting only that of the Circuit Court of Appeals in the second St. Francis Levee District case, were rendered prior to the amendment of the Bankruptcy Act, approved on June 22, 1938. 52 Stat., pages 840-940. And in this amending Act,

Section 64 was re-enacted in a form which, we submit, makes it even clearer than was true under the prior Act that Congress intended to vest in the Bankruptcy Courts the exclusive right to hear and determine the amount or legality of all taxes levied upon property being administered under their jurisdiction—whenever any question might arise in regard thereto, regardless of whether such taxes may have accrued prior to the adjudication, or subsequent thereto.

We say that the amending Act of June 22, 1938, makes this even clearer than the prior Act because the latter (11 U. S. C. A. 104) provided as follows:

“(Section 64) (a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof; provided, that no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.”

And then sets forth, in paragraph (b), “the debts to have priority, in advance of the payment of dividends to creditors and to be paid in full out of bankrupt estates, and the order of payment,” including, as Class (6), “taxes payable under paragraph (a) hereof.”

As the prior act was worded there was room for a possible argument that Congress only intended to include in the taxes, the amount or legality of which, when questioned, should be heard and determined by the Bank-

ruptcy Court, taxes assessed against the bankrupt, and not taxes assessed against the trustee. However, as above pointed out, the Courts held that both were included.

Now, in the amended Act of June 22, 1938 (52 Stat., at page 874), paragraphs (a) and (b) of section 64, as it appeared in the prior Act, are consolidated, there is a consolidation of some of the classes, Class (6) under the prior Act becomes Class (4), and there then appears a proviso as follows: "And provided further, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court." It will be noted that the Act of June 22, 1938, does not say "any such taxes," which, it might be contended, refers to taxes accruing against the bankrupt, but is unlimited in its terms—"in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court."

And we would stress the fact that the amending Act of June 22, 1938, was enacted by Congress with the presumptive knowledge that the Courts, in the Wilkins case, 43 Fed. (2nd) 670, decided by the Court of Appeals for the Fourth Circuit on September 19, 1930; in Dickinson v. Riley, 86 Fed. (2nd) 385, decided by the Eighth Circuit on November 19, 1936, and in the first St. Francis Levee District case, 91 Fed. (2nd) 118, decided by the Eighth Circuit on June 28, 1937, with certiorari denied by this Court on November 22, 1937, had held that the amount and legality of taxes assessed against the Trustee as well as of taxes assessed against the bankrupt, prior to adjudication, should be heard and determined by the Bankruptcy Court whenever any question might arise in regard thereto.

The rule is well settled that "where a statute that has been construed by the Courts of last resort has been re-

enacted in same, or substantially the same, terms, the legislature is presumed to have been familiar with the construction and to have adopted it as a part of the law, unless a contrary intent clearly appears or a different construction is expressly provided for." 59 *Corpus Juris*, "Statutes," paragraph 625, pages 1061-1063.

Heald v. District of Columbia, 254 U. S. 20, l. c. 23;
Johnson v. Manhattan Ry. Co., 289 U. S. 479, l. c. 500.

It is quite certain that the enactment of Section 64, in the amended Bankruptcy Act of June 22, 1938, in the light of the construction placed upon the corresponding section in the prior Act, in the decisions above cited (with no decision to the contrary), evidences an intent and purpose by Congress that the amount and legality of taxes assessed against a bankrupt estate, subsequent to the trustee acquiring title thereto, shall, when any question arises as to such taxes, be heard and determined by the Bankruptcy Court.

A. 2. Section 64a of the Bankruptcy Act Is a Part of Section 77 of That Act and Is Applicable to a Railroad Reorganization Proceeding.

This is in reply to point (2) in "Statement of the Questions Presented" on page 8 of the Petition for certiorari, and to petitioners' argument under head 3, on pages 9-12 of their original brief in support of petition, and also the supplemental brief filed on this same point.

At page 9 of their original brief, Counsel for petitioners quote Finletter on Bankruptcy Reorganization as expressing the opinion that Section 64a is excluded from application to a proceeding under Section 77. In this expression we respectfully submit that the learned author is in error.

One of the best and most convincing reasons for venturing to state that he is in error in this statement in his premise that the provision [in paragraph (1) of Section 77], "That 'in proceedings under this section and consistent with the provisions thereof' the rights of creditors shall be the same as if a voluntary petition had been filed and a decree entered thereon . . . is sufficient, it is believed, to exclude Section 64 from application to proceedings under Section 77" Upon the contrary, the provision quoted by Mr. Finletter, in connection with the corresponding provisions in Section 2 of Chapter X of the Bankruptcy Act (52 Stat., page 883), which deals with Corporate Reorganization (other than railroads), affords one of the strongest arguments for contending that Section 64a is to be regarded as a part of the railroad reorganization statute, and proceedings thereunder conducted in accordance with the requirements of Section 64a.

It will be recalled that both of these amendments to the Bankruptcy Act, Section 77, dealing with railroad reorganization, and the present Chapter X (originally Section 77B) dealing with Corporate Reorganization other than railroads, were enacted very close together, the former on March 3, 1933, and the latter on June 7, 1934, as parts of an effort on the part of Congress to afford relief to the industrial organizations of the Nation during a period of widespread financial distress.

As originally enacted, Section 77B (now Chapter X) provided in paragraph k that

"If an order is entered directing the trustee or trustees to liquidate the estate . . . (5) debts shall be entitled to priority as provided in Section 64 . . . (but) none of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j) and

(m) of Section 57, and subdivisions (a) and (e) of Section 70, shall apply to proceedings instituted under this Section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate" (48 Stat., at page 921).

As finally amended, in the Act of June 22, 1938, this provision is modified somewhat, and reads:

"Section 102. The provisions of Chapters I to VII, inclusive, of this Act shall, in so far as they are not inconsistent or in conflict with the provisions of this Chapter, apply in proceedings under this Chapter; **Provided, however, That Section 23, subdivisions h and n of Section 57, Section 64 (emphasis ours), and subdivision f of Section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of Chapters I to VII, inclusive"** (emphasis ours). 52 Stat., page 883.

Now, when we come to the railroad reorganization Section (77), we find that, in the original enactment, of March 3, 1933 (47 Stat., page 1481); paragraph (n) provides that

"In proceedings under this section, and consistent with the provisions thereof, the jurisdiction and powers of the Court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and his property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

This provision in Section 77 remains unchanged to the present time, except that in 1935 revision of this section (49 Stat., page 922), paragraph (n), as above quoted, appears as paragraph (1).

Now it is highly significant that, in these two statutes enacted for generally similar purposes, although dealing with different kinds of corporations, and so nearly at the same time, Section 64 is expressly excluded from operation in connection with Chapter X (formerly Section 77B) until there had been an order of liquidation, while, under Section 77, no such exclusion is made, but, on the contrary, all of the preceding provisions of the Act as to the jurisdiction and powers of the Court (including, because not excepted, Section 64) are made applicable thereto with the single proviso that such former provisions of the Act shall not be inconsistent with the provisions of Section 77.

Nor is there the slightest inconsistency between Section 64a and Section 77. Paragraph (c) (7) of Section 77 provides for the fixing, by the Bankruptcy Court, of a reasonable time for the filing of claims and for the classification of claims by the Court. As no other basis of classification is provided in Section 77, it is to be presumed that this shall be as provided in Section 64a. Assuming, as Petitioners contend, that taxes accruing during the trusteeship are to be placed in Class (1) as part of the necessary cost and expense of preserving the estate, the holders of claims in the subordinate classes are certainly very much concerned with the limitation of claims in Class (1) to a proper and legitimate basis, because provision will unquestionably be made, in the reorganization plan, for the payment of these several classes of claims either in cash, to the extent available, or in securities of some kind.

And while it is doubtless true, as Appellants contend, that there will be no liquidation in the sense of the ordinary bankruptcy, nevertheless the whole purpose of a reorganization under Section 77 would be frustrated if the property cannot be turned over to its ultimate owners,

upon final approval of the plan, with definitely known and valid liens, in such aggregate amount as the earnings of the property may enable it to carry. And the Bankruptcy Court is charged with the immediate supervision of the reorganization and the limiting of claims against the property to such claims as are valid and proper, and the classification of all claims according to law.

The object which Congress had in mind in the enactment of Section 77, and the nature of the public interest in a proceeding thereunder, are, very admirably, stated in *Continental Illinois National Bank & Trust Co. v. C. R. I. & P. Ry. Co.*, 294 U. S., at pages 671-672, as follows:

"Section 77 advances another step in the direction of liberalizing the law on the subject of bankruptcies. Railroad corporations had been definitely excluded from the operation of the law in (June 25) 1910 (Chap. 412, Sec. 36, Stat. at L. 838, 839, U. S. C., Title 11, Sec. 22), probably because such corporations could not be liquidated in the ordinary way or by a distribution of assets. A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities cannot be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become 'insolvent or unable to meet its debts as they mature.' "

Consequently, the provisions of Section 64-a, as to the classification of claims and also as to the determination by the Bankruptcy Court of any disputed tax claims, are not only entirely consistent with the provisions of Section 77, but may fairly be said to be essential to the orderly administration thereof.

The error of Petitioners' argument, in their supplemental brief, is their assertion that because "Section 64a is a priority section, it is only applicable to liquidation." As we have already pointed out, Section 77, specifically provided for a classification of claims, especially where "there are substantial differences in priorities, claims or interests," and assuming, as Petitioners contend, that "ad valorem taxes imposed by the State of Arkansas on physical property within its borders constitutes a first lien on such properties . . . and is a part of the expense of administration" the holders of subordinate claims and the final determination of an acceptable plan of reorganization are alike interested in limiting the amount of these tax claims to such amount as may be legally due, as well as in the payment by the Trustee of all taxes which are legally due, Congress has committed the hearing and determination of the amount and legality of the tax claims, whenever any question arises in regard thereto, to the Bankruptcy Court, which is charged with the initial responsibility of passing on and, whenever necessary, classifying the claims, and with the final duty, subject to appellate review, of confirming or disapproving the plan of reorganization. And in sustaining the jurisdiction of the bankruptcy courts to hear and determine the amount and legality of disputed tax claims, the decisions of the Courts of Appeals uniformly hold that this shall be done with due regard to the pertinent provisions of the State Statute. See *Henderson County v. Wilkins*, *Dickinson v. Riley* and *St. Francis Levee District v. Kurn*, all cited, *supra*.

The two St. Francis Levee District cases (*supra*) involved a railroad reorganization under Section 77, and in each of them the United States Circuit Court of Appeals for the Eighth Circuit specifically upheld the right of the Bankruptcy Court, in which the reorganization proceed-

ings were pending, to hear and determine the amount or legality of disputed tax claims—by reason of the provisions of Section 64a of the Bankruptcy Act. And in each of those cases certiorari was denied by this Court.

A. 3. An Appeal to the Bankruptcy Court to Hear and Determine the Amount or Legality of the Disputed Taxes, Under the Provisions of Section 64a of the Bankruptcy Act, Such as the Petition of the Trustee in the Present Proceeding, Is Not Prohibited by Section 24 of the Judicial Code as Amended (28 U. S. C. A. 41).

This is in reply to point (3) in "Statement of the Questions Presented," on page 8 of the Petition for Certiorari.

The argument of Counsel for Petitioners, on this point, would seem to be presented, in part, under heading 5, on pages 15-16 of their brief in support of said petition; also, in part, under heading 2, on pages 5-9 of said brief, and in part under heading 1, on pages 4-5 thereof, wherein they endeavor to escape the effect of the decisions in the St. Francis Levee District cases, in the latter of which, 98 Fed. (2nd) 394, at page 397, it was expressly held that such a proceeding as this is not prohibited by the Act of Congress of August 21, 1937, which is the last amendment to Section 24 of the Judicial Code, and which is apparently the provision upon which Petitioners are chiefly relying.

As repeated references are made by Petitioners' brief to this section of the Code, as amended either by the Act of May 14, 1934 (48 Stat. 775), or by the Act of August 21, 1937 (50 Stat. 738), we will quote the essential provisions thereof, including the two amendments.

The entire section is somewhat lengthy, and the preliminary part thereof is in no way germane to the present

controversy. It commences "The district courts shall have original jurisdiction as follows:" It then sets forth certain classes of actions not at all related to the present controversy, and then proceeds as follows:

"(A) Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State."

(B) "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

In the foregoing copy of Section 24 we have inserted the letters A and B. That part of the text following the letter A is the amendment of May 14, 1934 (48 Stat. 775), referred to by Counsel for Petitioners as "the Johnson Act," and that part which follows the letter B is the amendment of August 21, 1937 (50 Stat. 738).

Now, in the first place, an examination of the petition filed by the Trustee in the District Court, which is the basis of the present controversy, will show that it does

not seek "to enjoin, suspend or restrain" either "the enforcement, operation or execution of any order of an administrative board or commission of a State" (within the purview of the 1934 amendment) nor "the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State," within the purview of the amendment of August 21, 1937.

The assessment as originally made by the Arkansas Corporation Commission was, according to the averments of the Trustee's petition (paragraph 5, R. 9), certified by that body to the County Assessors on December 5, 1939, the day after the Trustee's protest was overruled by that Commission. The Trustee, it is quite true, has refused to pay the taxes based upon said assessment, in their entirety—claiming that same are, in part, in violation of the Statutes and of the Constitution of Arkansas and also in violation of the Fourteenth Amendment. However, the Trustee, at no place in his petition asks for any injunctive relief, either against the Arkansas Corporation Commission or against the tax collectors of the fifty-one counties. They, or either of them, are not restrained by anything in the Trustee's petition, or in the order of the District Court, from taking any action which they might or could have taken had the Trustee's petition never been filed. It is perfectly true that the Bankruptcy Court would not, we assume, permit the railroad property under its custody, or that portion thereof located in Arkansas, to be sold under any alleged lien for the taxes based on the 1939 assessment. This power of the Bankruptcy Court has been very clearly and tersely stated by this Court, in an opinion by Mr. Justice Brandeis, in *Ex Parte Baldwin*, 291 U. S. 610, at page 616, as follows:

"The inherent power of the Bankruptcy Court to protect its jurisdiction, over property of which it has taken possession, from interference by suit thereafter

begun in a State Court, has not been abridged by any legislation of Congress."

But, we repeat, this power of the Bankruptcy Court is not invoked in the Trustee's petition. The Bankruptcy Court may, and should, require the Trustee to pay all taxes which may be properly due, Federal, State, County or municipal. But the Bankruptcy Court may not, and should not, direct the Trustee to pay any disputed tax beyond the amount which that Court may find to be properly due. And the Trustee's petition in this case merely prays the Bankruptcy Court to hear and determine the amount and legality of the questioned tax—and that "this determination may be had without unnecessary delay" (paragraph 14 of petition, R. 18).

Such an appeal to the Bankruptcy Court was specifically declared, in *Henderson County v. Wilkins*, 43 Fed. (2nd) 670, at page 671, not to be a proceeding to enjoin action by the taxing authorities.

It will be further noted that the Johnson Act (48 Stat. 775) deprives the Federal District Courts of jurisdiction of suits "to enjoin, suspend or restrain the enforcement, operation or execution of any order of an administrative board or commission of a State" **only** where jurisdiction is based **solely** upon the ground of diversity of citizenship or the repugnance of such order to the Constitution of the United States—and in the petition of the Trustee to the District Court jurisdiction is not based upon either of those grounds, but instead is based upon the express provision of Section 64a of the Bankruptcy Act.

For reasons which are very clearly stated in *Board of Directors of St. Francis Levee District v. Kurn*, 98 Fed. (2nd) 394, at page 397, the remedy in the Courts of the State is not a full, complete and adequate remedy with

respect to tax claims against a railroad in reorganization under Section 77 of the Bankruptcy Act.

But even though an adequate remedy might be provided in the State courts, the jurisdiction conferred by Congress upon the Bankruptcy Courts, in dealing with claims against the property of a bankrupt or liens asserted against same, is exclusive. As was said by Mr. Justice Black in expressing the unanimous opinion of this Court in *Kalb v. Feuerstein*, 308 U. S. 433, at page 439:

"The Constitution grants to Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."

And in *New York v. Irving Trust Co.*, 288 U. S. 329, at page 332, this Court quoted with approval from a previous decision (*Re Wood & Henderson*, 210 U. S. 246, at page 254) as follows:

"Congress has the right to establish a uniform system of bankruptcy throughout the United States and, having given jurisdiction to a particular District Court, to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights."

And from another previous opinion of this Court, in *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, at page 217, as follows:

"We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all

matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."

And in *Ex parte Baldwin*, 291 U. S. 610, at page 615, this Court, in an unanimous opinion delivered by Mr. Justice Brandeis, says:

"Having possession" (of the property of a bankrupt) "the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same (citing cases). The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them (emphasis ours) (citing cases). In bankruptcy this rule applies regardless of whether the property is located in the district in which the bankruptcy proceeding originated."

The cases cited at page 8 of Petitioners' brief, i. e., *McLaughlin v. St. Louis & Southwestern Ry. Co.*, 232 Fed. 579, and *Missouri Pacific Railroad Co. v. Conway & Vilonia Road District*, 280 Fed. 401, did not involve bankruptcy proceedings at all, and are not in point upon the question at issue.

Section 64a of the Bankruptcy Act specifically provides "that in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court."

Prior to the enactment of this provision in its present form, in the Act of June 22, 1938 (52 Stat., at page 874), the corresponding provision in the former Act, which was

generally similar, although somewhat less comprehensive in terms, had been construed by the Courts, in the cases above cited, to apply to a reorganization under Section 77 and to confer upon the bankruptcy court exclusive jurisdiction to hear and determine the amount or legality of taxes imposed under a claim of statutory authority, even though there might be provision, under the State law, for a review and determination of such tax assessment in the Courts of the State.

Section 64a, in its present form, was enacted after the amendment of Section 24 of the Judicial Code in the Acts of May 14, 1934, and August 21, 1937, and Congress, having presumptive knowledge of the construction placed by the Courts upon the corresponding section in the prior law, is presumed to have adopted it with that construction in mind. Authorities in support of this rule of statutory construction are cited under the first head of this argument.

Consequently, as no exception or limitation appears in the enactment of Section 64a in its present form, the conclusion of the Circuit Court of Appeals in its opinion in this case (R. 50) that Section 24 of the Judicial Code, as amended, has no relation to the administration of the estates under the bankruptcy act," is clearly correct.

A. 4. The Petition of the Trustee as Filed in the Bankruptcy Court Presents a Justiciable Controversy.

The Trustee's petition alleges:

(a) In paragraph 4 of petition (R. 7) that according to the provisions of the Arkansas Statutes, the power to assess the property of the Trustee for taxation is vested in the Arkansas Corporation Commission, and that, according to said statutes, all property assessed by said Commission shall be on the basis of the true market value

thereof, but that (paragraphs 8, 9 and 10 of petition, R. 11-13) said Commission has adopted erroneous methods in arriving at the true market value of the railroad property, resulting in an assessment of \$28,050,000 for the year in question, whereas the maximum proper assessment of said property for said year, determined in accordance with the statutory mandate, would not exceed \$16,830,000.

It will be observed from Section 2048 of the Arkansas Statutes (set forth in appendix hereto) that the assessment of public utility property in that State is required to be made upon the unit basis, i. e., by first determining the System value of the entire property; then deducting therefrom the value of all property owned by the Company and not used in its business as a public utility, and then apportioning the remainder to the State of Arkansas by the use of a proper allocation factor. It will also be noted from paragraph 8 of the Trustee's petition (R. 8) that it is alleged that property in Arkansas is not assessed by the Commission at 100 per cent of its true market value, and that 40 per cent is the maximum per cent of full value at which other property is assessed by the Arkansas Corporation Commission, and that this per cent was used in the assessment of Trustee's properties in said State for the preceding year (1938).

A perusal of the petition will show that the errors complained of, in the assessment by the Arkansas Commission, were in the determination of System value, by methods which have been repeatedly criticized by the Courts as not proper for the determination of true market value—not only in tax cases but in other cases where the issue is with respect to such true market value.

The Trustee's petition alleged, and the Trustee has at all times stood ready to prove, that, due to general business conditions and to enormous increase in competition,

which has taken away a great amount of traffic from the Trustee's railroad properties, greatly impairing the value of the entire System, and rendering some portions thereof virtually valueless—thereby rendering original cost and cost of reproduction wholly unreliable determinants of value also, that upon the basis of fair and accurate methods for the determination of System value, and proper allocation thereof to the State of Arkansas, and the use of an equalization factor of 40 per cent, a correct assessment of Trustee's properties for said year should not exceed \$16,830,000—whereas the assessment made by the Arkansas Corporation Commission was actually \$28,050,000.

An assessment based upon a determination of true market value which is very greatly in excess of the actual true market value of the property, prescribed by the State statute as the basis upon which assessment should be made, is clearly illegal, and relief should be granted in a case of which the Federal Court properly has jurisdiction, as it has of this case.

Henderson County v. Wilkins, 43 Fed. (2nd) 670;
In re Gustav Schaefer Co., 103 Fed. (2nd) 237,

a decision of the United States Circuit Court of Appeals for the Sixth Circuit, in which the Court says:

"This provision" (section 64a of the Bankruptcy Act) "is found in the Act of July 1, 1898, 30 Stat. 563, and courts have ruled with unanimity that the Bankruptcy Court is not irrevocably bound by an irrebuttable presumption of validity and correctness of the assessment made by the taxing authorities. The language of the Statute is plain that it is the duty of the Court to hear and determine whether the value at which the property of the bankrupt was assessed was proper and correct according to the local taxing statutes."

The case last cited involved the assessment of a manufacturing plant, located in Cleveland, Ohio. And we would add that much less is the Bankruptcy Court "irrevocably bound by an irrebuttable presumption of validity and correctness of the assessment made by the taxing authorities" in a case where, as here, the allegations of excessive assessment are based upon a grossly excessive valuation set by the State Commission upon an interstate railroad System operating in eight States.

(b) The petition alleges, in paragraph 13 (b) (R. 17-18), that the assessment would result in exacting from the Trustee as taxes on his properties in Arkansas an amount greatly in excess of the Trustee's fair and equitable share of the tax burden of said State, in violation of Section 5 of Article XVI of the Constitution of Arkansas. That section, so far as germane to this proceeding, provides as follows:

"All property subject to taxation shall be taxed according to its value (2), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State, (b), no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value
• • •"

It will be noted that this provision is all comprehensive in its scope. It does not provide that all property of the same class or character shall be taxed on the same basis, but rather that "all property subject to taxation shall be taxed according to its value" and, further, that "no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

Now, if it be proved, as the Trustee's petition alleges, that his property in Arkansas is being taxed, not accord-

ing to the true value thereof but rather on a basis very greatly in excess of its true market value, this fact not only establishes a direct violation of the mandate of the Constitution, but, in connection with the presumption that the taxing authorities are not likewise violating the mandate of the Constitution and of the Statutes in their assessment of property generally throughout the State, establishes a violation of Section 5 of Article XVI of the Constitution.

Chicago & Northwestern Ry. Co. v. Eveland, 13 Fed. (2nd) 442, at pages 448-449.

Also *Bailey v. Megan*, 102 Fed. (2nd) 65, at page 67, wherein the Court of Appeals for the Eighth Circuit, after a thorough analysis of the evidence in that case, concluded that the railroad property had been assessed for taxation at a figure materially in excess of its true value in money, in violation of the Constitution and Statute of South Dakota, and, dealing with the question of discrimination, says:

“So far as the issue of discrimination is concerned, we think there is no occasion to disturb the findings of the District Court to the effect that discrimination existed. The duty of the State authorities under the State laws was to assess property for not more than its full value. The presumption is that they obeyed the law, * * *. It is a fair assumption that the taxing authorities did not over assess the farms in the State.”

In a proceeding over which the Federal Court has jurisdiction, an assessment for State taxation, found to be in violation of the Constitution of the assessing State, will be annulled.

Dawson v. Kentucky Distilleries Co., 255 U. S. 288.

At page 12 of their petition for certiorari, Counsel for Petitioners cite a decision of the Supreme Court of Arkansas, in *Rogers v. City of Rogers*, 174 Ark. 486 (295 S. W. Rep. 708), as authority for the proposition that a mere averment of discrimination without more specific statement of facts constituting the discrimination was insufficient. In that case, which involved an effort by the plaintiffs to enjoin the enforcement of an occupation tax imposed by the City of Rogers, plaintiffs proceeded to trial and final judgment in the Chancery Court, in which the decree was against them. Apparently no evidence was offered in support of a general allegation of discrimination under one section of the ordinance. Upon appeal to the Supreme Court, it was held that in the absence of a specific allegation and showing of facts, such a charge of discrimination could not be sustained, and the decree of the Chancery Court was affirmed.

If there be any merit in Petitioners' objection to the generality of the allegations of discrimination, in the Trustee's petition in the District Court, which we do not think there is, Petitioners' proper remedy would be by motion, in the District Court, to make the petition more definite, under Rule 12 (e) of the Rules of Civil Procedure for the District Courts of the United States, as adopted by this Court. Most certainly this objection, even though valid, does not warrant certiorari to the Court of Appeals, following an affirmance by the Court of an order of the District Court overruling a motion to dismiss the Trustee's petition.

(c) And in the third place, the Trustee's petition alleges, in paragraph 13 (b) (R. 18) that the discrimination against the Trustee, in the over-assessment of his properties, has been arbitrary, persistent and has been practiced over a period of years, with the result of imposing upon the Debtor and upon the Trustee an undue and

disproportionate share of the taxes in the State of Arkansas, in violation of the Fourteenth Amendment to the Federal Constitution.

Counsel for Petitioners, at page 13 of their petition contend that the decision of this Court in *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U. S. 362, renders untenable the allegation of a violation of the due process clause of the Fourteenth Amendment.

As we read the opinion in the Browning case, it does nothing of the sort. It appears from that opinion that there is nothing, in the Constitution or Statutes of Tennessee prohibiting the application of different yardsticks of value to different classes of property, and this Court points out that the petitioner in the Browning case (the railway Company) makes no claim that its property is singled out from among other public service corporations for discrimination. The opinion in that case also refers (page 317) to the previous decision of this Court in *Great Northern Railway v. Weeks*, 297 U. S. 135, as standing alone in striking down "a nondiscriminatory assessment simply because it was thought excessive."

But in the present case, as has been pointed out, the Constitution of Arkansas specifically prohibits the application of different yardsticks of value for different classes of property. It prescribes true value for all alike, and the statute prescribes this same basis of value, with even greater particularity, for railroad property and other property assessed by the Arkansas Corporation Commission. And in the absence of any constitutional or statutory warrant for such procedure, to assess the Trustee's properties at a figure vastly in excess of their true market value and thereby impose upon the Trustee an undue and disproportionate share of the tax burden, as compared with other property in the State, would certainly appear

to constitute a violation of the Fourteenth Amendment. Such has been the holding of this Court in numerous cases. Thus, in *Kansas City Southern Ry. Co. v. Road Improvement District No. 6*, 256 U. S. 658, it was held, in a unanimous opinion, that (page 661):

“Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all,”

and, also, in

Road Improvement District No. 1 v. Missouri Pacific R. R. Co., 274 U. S. 188, at page 194,

wherein it was held that

“Our conclusion is that the assessment against the railroad is unreasonably discriminatory in so far as it is based on personal property, and in this respect violates the equal protection clause of the Fourteenth Amendment, and it is otherwise so excessive as to be a manifest arbitrary exaction and in violation of the due process of law clause of the same Amendment.

We would remark, however, that, wholly apart from the allegation of a violation of the Fourteenth Amendment, the averments in the Trustee's petition, as to the assessment being in violation of the Statutes and of the Constitution of Arkansas, present a justiciable controversy, calling for consideration and determination by the Bankruptcy Court under the provisions of Section 64a of the Bankruptcy Act.

B. The Petition for Certiorari Should Be Denied Because the Granting of Such Writ Is Solely a Matter of Sound Judicial Discretion, and the Facts Presented Do Not Bring This Case Within the Classes of Cases Calling for the Exercise of Such Discretion, as Set Forth in Paragraph 5 of Rule 38 of the Rules of This Court.

The decision of the Circuit Court of Appeals most certainly does not fall within any of the classes of cases described in paragraph 5 (b) of Rule 38. It is directly in line with the decisions of the same Court in the two St. Francis Levee District cases (*supra*), in each of which this Court denied certiorari. Petitioners, at pages 4-5 of their brief, seek to distinguish those cases upon the ground that they did not involve any taxes imposed by the State or its political subdivisions. Be that as it may, Section 24 of the Judicial Code, as amended by the Act of August 21, 1937, upon which Petitioners are relying, refers to "any tax imposed by or pursuant to the laws of any State," and most certainly the District officials must have contended that the levee taxes involved in the St. Francis Levee District cases complied with that description—otherwise they possessed no validity whatever. These levee assessments are described in the Arkansas statutes (Section 4465, Pope's Digest, 1937) as taxes; they are referred to throughout the opinions of the Court of Appeals as **taxes**, and they comply with the definition of "taxes" approved by this Court in *New Jersey v. Anderson*, 203 U. S. 483, at page 492, i. e., "• • • imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement."

The decisions in the two St. Francis Levee District cases are directly in point in the present proceeding.

So far as concerns the "adequacy" of an appeal from

the Arkansas Corporation Commission to the Pulaski Circuit Court, to which Petitioners refer at page 5 of their petition for certiorari, and at page 4 of their brief, such appeal would most certainly be no more "adequate" than the right of the Trustee to defend the suits pending in the State Courts, which were considered in the two St. Francis Levee District cases.

Furthermore, Section 2019 of the Arkansas Statutes, to which Petitioners refer, provides that such appeal shall be taken within thirty days after the entry of the record of the Arkansas Corporation Commission. As is alleged in paragraph 5 of the Trustee's petition (R. 9), the final order of the Commission was entered on December 4, 1939, and on December 5, 1939, the assessment so made was certified by the Commission to the Assessors of the fifty-one counties in Arkansas in which the Trustee's property is located. Passing by the question as to the adequacy of an appeal to the Pulaski Circuit Court to remove the tax liens in these fifty-one counties, as to which there is grave doubt, it is, of course, perfectly obvious that the time for such appeal has long expired, and Petitioners are now seeking to escape any judicial review of the assessment made by the Arkansas Corporation Commission.

None of the decisions cited by Petitioners, in their petition or in either of their two briefs, are at variance, as to any of the jurisdictional points involved in the motion to dismiss the Trustee's petition, with the opinion of the Court of Appeals herein.

Furthermore, as was pointed out in our opening statement, this proceeding involves an appeal from a purely interlocutory order of the District Court. Neither the decision of that Court nor the decision of the Court of Appeals involves the ultimate merits of the case in any way whatever. Under the decision of the Court of Appeals, the

District Court is left free to hear and determine the amount or legality of the disputed taxes, as that Court is required to do by Section 64a of the Bankruptcy Act.

As has been held by this Court in several cases, a writ of certiorari will not, except in extraordinary circumstances, be issued until final decree.

American Construction Company v. Jacksonville, Tampa and Key West Ry. Co., 148 U. S. 372, l. c. 385;

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, at page 258.

It is respectfully submitted that the writ of certiorari should be denied.

RUSSELL L. DEARMONT,

THOMAS T. RAILEY,

HARVEY G. COMBS,

JAMES M. CHANEY,

Counsel for Guy A. Thompson, Trustee,
Respondent.

APPENDIX.

Section 2048, Arkansas Statutes.

(Pope's Digest of Statutes of Arkansas for 1937.)

Section 2048. Apportionment of Assessed Value. The Commission shall assign or apportion the assessed value of the property of all persons, firms, companies, co-partnerships, associations and corporations, which it is required to assess, in the following manner:

There shall be deducted from the true market or actual value of the entire property, tangible and intangible, ascertained as in this Act provided, the true market or actual value, as ascertained from the information furnished by report, or otherwise, of all real and personal property of such company not used in its business as a public utility, and the remainder shall be treated as the true market or actual value of all its property, tangible and intangible, actually used or employed in its public utility business.

The Commission shall then ascertain and fix the value of the total utility operating property, tangible and intangible, in this State, by taking such proportion of the true market or actual value of the entire operating property, tangible and intangible, of such company, actually used in its public utility business, as its total lines within this State bear to the total lines both within and without this State, or as its total receipts or income from operation within this State bear to its total receipts or income from operation both within and without this State, or by using such other recognized method, or combination of methods, as will, in the judgment of the Commission, result in a just and equitable apportionment to this State of its due proportion of the value of the total utility operating property.

When the value of the total utility operating property,

tangible and intangible, in this State has been determined; or when the property and operations of such company is wholly within this State, there shall be assigned or apportioned to the several counties, towns, school districts and other taxing districts through or in which such company operates the value of all real estate and all tangible personal property which had a fixed situs therein on the first day of January of the current tax year; and the remaining part of the assessment, if any, shall be assigned or apportioned among the several taxing districts in proportion to the value of the tangible property assigned or apportioned thereto. Provided, that the value assigned to rolling stock of street, suburban or interurban railroad, railroad and bus line companies shall be apportioned among the several counties, towns and school districts through or in which such company operates in proportion to the mileage operated therein, and provided, further, that the value of the personal property of any express or sleeping car company shall be apportioned among the several counties, towns, and school districts through or in which such company operates in proportion to the mileage operated therein.

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CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 715.

THE ARKANSAS CORPORATION COMMISSION and FIFTY-
ONE COUNTY TAX COLLECTORS OF ARKANSAS,

Petitioners,

vs.

GUY A. THOMPSON, as Trustee of MISSOURI PACIFIC
RAILROAD COMPANY, Debtor,

Respondent.

BRIEF OF RESPONDENT.

RUSSELL L. DEARMONT,

THOMAS T. RAILEY,

HARVEY G. COMBS,

JAMES M. CHANEY,

Counsel for Guy A. Thompson,

Trustee, Respondent.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 715.

THE ARKANSAS CORPORATION COMMISSION and FIFTY-
ONE COUNTY TAX COLLECTORS OF ARKANSAS,
Petitioners,

vs.

GUY A. THOMPSON, as Trustee of MISSOURI PACIFIC
RAILROAD COMPANY, Debtor,
Respondent.

BRIEF OF RESPONDENT.

STATEMENT.

This controversy originates with a petition filed by Guy A. Thompson, Trustee for the Missouri Pacific Railroad Company, in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, to hear and determine the amount and legality of certain taxes, in the fifty-one counties in the State of Arkansas, based upon an assessment of the Trustee's railroad properties in that State for the year 1939.

The Trustee filed this petition in reliance upon the mandate of Section 64 of the Federal Bankruptcy Act, as

amended on June 22, 1938 (52 Stat. at page 874) that "in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court."

The petition (R. 4-16) sets forth, with some particularity, the nature of "the question" as to the taxes in dispute. The attack upon the assessment made by the Arkansas Corporation Commission is predicated primarily upon the provision of the Arkansas statutes (Section 2044, Pope's Digest), which is copied in full in appendix to petitioners' brief, that all property to be assessed by the Commission shall be upon the basis of the fair market value thereof, or, to quote the statute literally, "upon the consideration of what a clear fee-simple title thereto would sell for under conditions under which that character of property is usually sold."

The petition alleges, in paragraph 13 (b) (R. 15), that this provision of the Arkansas statute has been violated in that the Trustee's property in Arkansas has been assessed for the year in question (1939), and for many years prior thereto, at more than its full and actual value.

The petition further alleges that this assessment of the Trustee's property at much more than its full and actual value was likewise in violation of Section 5 of Article XVI of the Constitution of Arkansas, which provides that all property shall be taxed according to its value and that no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, and that all values shall be ascertained so as to make same equal and uniform throughout the State—and also, because imposing upon the Trustee a wholly disproportionate share of the tax burden, in violation of the Fourteenth Amendment to the Constitution of the United States.

Reverting for a moment to the allegations of over-

assessment, in violation of the Arkansas statutes and Constitution, it will be observed that the Arkansas statute (Section 2048 of Pope's Digest), which is fully set forth in appendix hereto, provides for the assessment of the property of an interstate railroad, or other utility, operating in part within that state, upon a unit basis—that is to say, first assigning a value to the entire railroad system and then determining the part thereof which should properly be assigned to Arkansas. It is also averred, in paragraph 8 of the petition (R. 9) that other property in Arkansas is assessed at a maximum of 40 per cent of the full value thereof, and it is but fair to the petitioners herein to state that no controversy exists with respect to either the allocation factor or the equalization factor used by the Arkansas Commission in arriving at the assessment under review. As is averred in paragraph 8 of the petition (R. 9) the assessment for 1939, in the sum of \$28,050,000, was almost exactly the same as the assessment for 1938, which was \$28,114,960. Extensive evidence, both by the State and by the Trustee, has already been presented in the controversy involving the 1938 assessment, in which case the order of the District Court overruling the State's motion to dismiss, is reported in **33 Fed. Supp. 728**, to which reference is made at page 12 of petitioners' brief. In that case the allocation factor of 28.39411 per cent, representing the Arkansas proportion of the System property, and the equalization factor of 40 per cent, were both stipulated as proper.

In other words, the entire controversy as to the assessment hinges upon the **System Value** of a railroad operating in eight different states. Petitioners are quite correct in the statement on page 4 of their brief, that it is only the System value, as found by the Arkansas Commission, which is assailed.

It is this entire railroad system which is involved in the

reorganization proceeding, in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, under the provisions of Section 77 of the amended Bankruptcy Act.

The Trustee's petition further avers the manner in which the railroad system was grossly over-valued by the Arkansas Corporation Commission—in that [paragraphs 8 and 13 (a)] predominant weight was assigned to original cost and to cost of reproduction, and wholly inadequate consideration given to the market value of the railroad's stocks and bonds and to an enormous reduction in earnings occasioned by general business considerations and to rapid increase of competition from buses, trucks, water and air.

The factors of original cost and cost of reproduction, to which the Commission assigned predominant weight in arriving at the true market value of the railroad system, have been uniformly and consistently condemned as unreliable determinants of true market value, in numerous decisions of this Court and of the United States Circuit Courts of Appeals, to which reference will be made in argument.

Attention should be directed to an incomplete and misleading reference to section 2044 of the Arkansas statutes, which appears at page 3 of petitioners' brief. It is there stated that this section "requires the Commission to consider the estimated investment and valuation of the property as set up in the Company's books as the basis for adjustment of rates or charges for service * * *."

Section 2044 is correctly set forth in appendix to petitioners' brief, at page 44 thereof, and it will be observed that the statute actually provides that "as evidence tending to show what this" (true market value) "would be, the Commission, in so far as other evidence and information in its possession does not make it appear improper or unjust for it to do so, shall ascertain as nearly as it can

and consider the market or actual value of all outstanding capital stock and funded debt and the income of such companies, and also the estimated investments and valuation of said property as set up by the officers or agents of such companies as a basis for the adjustment of rates or charges for service to the public by such companies, and such other information as to value the Commission may obtain."

The Trustee's petition avers that the Arkansas Corporation Commission were fully advised of the facts which rendered original cost or cost of reproduction of the properties determinants of true market value of the railroad property at this time, and further avers that a value of the railroad system based upon market value of stocks and bonds and earnings (which are the first two determinants specified in the Arkansas statute) would result in an assessment not exceeding the sum of \$16,830,000, or \$11,220,000 less than the assessment made by the Arkansas Commission for the year in question.

The petition alleges, in paragraph 5 (R. 6-7), full compliance with all the administrative steps required by the Arkansas statute.

On page 5 of their brief, petitioners say that the Trustee fails to allege compliance with the remedy through appeal to the courts of Arkansas, for which provision is made in sections 2019-2020 of the Arkansas statutes, and which, petitioners say, at page 15 of brief, has been held by the Supreme Court of Arkansas "to be a judicial review of the action of the administrative body."

It is quite true, that the Trustee did not appeal to the Arkansas courts. Following the decisions by the United States Circuit Court of Appeals in the two St. Francis Levee District Cases (to which reference will be made in argument), and the denial by this Court of certiorari in each of those cases, the Trustee acted upon the assumption that, under the provisions of Section 64 of the Bank-

ruptcy Act, the Bankruptcy Court in which the reorganization proceeding was pending, i. e., the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, was the proper tribunal, and the only proper tribunal to hear and determine the proper amount and validity of the disputed tax. And in reliance upon this assumption, which we submit was wholly warranted, the Trustee, on April 11, 1940, before the first installment of the taxes based upon the 1939 assessment fell due, filed his petition in that court, praying authority to tender payment of the sum of \$620,645, which he conceded to be due for that year, based upon a proper assessment, and asking the Court to promptly hear and determine the controversy as to the balance, amounting to \$416,043.17.

It should be pointed out that if the petitioners' motion to dismiss the Trustee's petition is sustained, the petitioners will escape any judicial review of the very enormous over-assessment which the Trustee alleges to have been made by the Arkansas Corporation Commission, because the thirty-day period following the entry on the record of the Arkansas Corporation Commission for its order, within which appeal might be prosecuted to the Circuit Court of Pulaski County, under the provisions of section 2019 of the Arkansas statute, which is set forth in appendix to petitioners' brief, at page 44 thereof, has, of course, now long since expired.

Following the filing of the Trustee's petition, and before any final order was made in connection therewith, petitioners, on July 5, 1940, filed in said District Court their motion to dismiss (R. 21-29). This motion was overruled by the District Court, with an opinion (R. 29-34), and appeal from the order of that court was prosecuted by petitioners to the United States Circuit Court of Appeals for the Eighth Circuit, by which the interlocutory order of the District Court was affirmed, 116 Fed. (2nd) 179.

POINTS TO BE ARGUED AND AUTHORITIES.

1. The decisions of the United States Circuit Court of Appeals for the Eighth Circuit in the St. Francis Levee District cases were correct and were properly followed by the District Court in the present case.

Authorities.

St. Francis Levee District v. Kurn, 91 Fed. (2nd) 118 (Certiorari denied, 302 U. S. 750);
St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394 (Certiorari denied, 305 U. S. 647);
St. Francis Levee District v. St. Louis-San Francisco Ry. Co., 74 Fed. (2nd) 183;
Ex Parte Baldwin, 291 U. S. 610;
Henderson County, N. C., v. Wilkins, 43 Fed. (2nd) 670;
In re Gustav Schaefer, 103 Fed. (2nd) 237;
Continental Illinois National Bank & Trust Co., 294 U. S. 648.

2. The powers of the Bankruptcy Court were not exceeded.

Authorities.

In re Wood & Henderson, 210 U. S. 246;
U. S. F. & G. Co. v. Bray, 225 U. S. 205;
Van Huffel v. Harkelrode, 284 U. S. 225;
New York v. Irving Trust Co., 288 U. S. 329;
New Jersey v. Anderson, 203 U. S. 483;
Kalb v. Feuerstein, 308 U. S. 433;
Section 64a of Bankruptcy Act;
Section 77 of Bankruptcy Act.

3. The provision of Section 64 of the Bankruptcy Act "that in case any question arises as to the amount of legality of any taxes, such question shall be heard and determined by the Court" is not inconsistent with section

77 of the act, and is of governing force in proceedings under section 77.

Authorities.

Section 64a of Bankruptcy Act;
Section 77 (1) of Bankruptcy Act;
Chap. 10, Section 102, of Bankruptcy Act;
Michigan v. Michigan Trust Co., 286 U. S. 334;
In re Denver & Rio Grande Western R. R. Co., 23
Fed. Supp. 298;
St. Francis Levee District v. Kurn, 91 Fed. (2nd)
118;
St. Francis Levee District v. Kurn, 98 Fed. (2nd)
394.

4. The jurisdiction to hear and determine any question as to taxes, under the provisions of Section 64a of the Bankruptcy Act, extends to taxes accruing during the Trustee's possession of the property.

Authorities.

Henderson County, N. C., v. Wilkins, 43 Fed. (2nd)
670;
Dickinson v. Riley, 86 Fed. (2nd) 385;
In re Denver & Rio Grande Western R. R. Co., 23
Fed. Supp. 298;
St. Francis Levee District v. Kurn, 91 Fed. (2nd)
118;
St. Francis Levee District v. Kurn, 98 Fed. (2nd)
394.

5. The preliminary order of the District Court, entered on April 11, 1940, was not an injunction, and, a fortiori, it was not in violation of Section 24 of the Judicial Code.

Authorities.

Section 24 of the Judicial Code (50 Stat. 738);
Ex Parte Baldwin, 291 U. S. 610;

Henderson County, N. C., v. Wilkins, 43 Fed. (2nd) 670;

St. Francis Levee District v. Kurn, 91 Fed. (2nd) 118;

St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394.

6. Even though the Arkansas statutes may provide for a judicial review in the state's courts of the assessments made by the Corporation Commission, this does not deprive the Bankruptcy Court of the jurisdiction to hear and determine the amount or legality of any tax as to which any question may arise.

Authorities.

U. S. F. & G. Co. v. Bray, 225 U. S. 205;

Kalb v. Feuerstein, 308 U. S. 433.

7. The issue presented in Trustee's petition is clearly justiciable.

Authorities.

Constitution of Arkansas, Article XVI, Section 5;

Section 2044, Statutes of Arkansas;

Section 2048, Statutes of Arkansas;

Dawson v. Kentucky Distilleries, 255 U. S. 288;

New Jersey v. Anderson, 203 U. S. 483;

In re Gustav Schaefer Co., 103 Fed. (2nd) 237;

Great Northern Ry. Co. v. Weeks, 297 U. S. 135;

Chicago & Northwestern Ry. v. Eveland, 13 Fed. (2nd) 442;

Bailey v. Megan, 102 Fed. (2nd) 651;

Standard Oil Co. v. Southern Pacific Co., 268 U. S. 146;

A. B. & C. R. R. Co. v. United States, 296 U. S. 33;

Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U. S. 658;

Road Improvement District No. 1 v. Missouri Pacific R. R. Co., 274 U. S. 188.

ARGUMENT.

We will in this argument follow, in all respects, the order of presentation set forth in petitioners' brief.

1. The St. Francis Levee District Cases.

At the outset of their brief, petitioners seek to escape the effect of the two St. Francis Levee District cases—*Board of Directors St. Francis Levee District v. Kurn*, 91 Fed. (2nd) 118, in which certiorari was denied by this Court on November 22, 1937 (302 U. S. 750), and *Board of Directors of St. Francis Levee District v. Kurn*, 98 Fed. (2nd) 394, in which certiorari was denied by this Court on November 14, 1938 (305 U. S. 647).

The suggestion, on page 11 of petitioners' brief, that the assessments made by the St. Francis Levee District were not to be regarded as taxes, on the same basis as "taxes imposed by the State or its political subdivisions," because the Supreme Court of Arkansas has, as is pointed out by the Court of Appeals in the last St. Francis Levee District case (98 Fed. [2nd], at page 397), held such levee districts to be "quasi-public corporations, like railroads," is fallacious. This will clearly appear from a brief review of the litigation involving those levee assessments, as revealed in the cases thus far decided. In a prior suit involving assessments for other years made by this same levee district, the Court of Appeals for the Eighth Circuit reversed a decree of the United States District Court for the Eastern District of Arkansas which had enjoined the enforcement of said assessments in response to a suit filed by the St. Louis-San Francisco Railway Company prior to its adjudication as a debtor under Section 77 of the Bankruptcy Act. The opinion of the Court of Appeals in that case—*Board of Directors of St. Francis Levee District v.*

St. Louis-San Francisco Ry. Co., 74 Fed. (2nd) 183, quotes at length the Arkansas statutes authorizing the creation of such levee districts and the assessment of taxes upon property within the district. And the Court of Appeals, in the opinion last cited, reversed the decree of the District Court and directed that the bills for injunction be dismissed because the railway company had failed to exhaust its administrative remedies before the Levee Board created pursuant to the statutes of the state.

In the statutes of Arkansas authorizing these levee district assessments, they are referred to as "taxes." They are similarly designated throughout the three opinions of the Circuit Court of Appeals—74 Fed. (2nd) 183, 81 Fed. (2nd) 118, and 98 Fed. (2nd) 394, and they conform in all respects to the definition of "taxes" as approved by this Court in *New Jersey v. Anderson*, 203 U. S. 483, at page 492, i. e., " * * * imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement."

It will be observed that the decisions in all three St. Francis Levee District cases were rendered by the same court—the Court of Appeals for the Eighth Circuit. When the two latter cases, reported in 91 Fed. (2nd) 118 and 98 Fed. (2nd) 394, came before that Court the railway company was in reorganization and the Court was dealing with these facts:

(a) Claims for taxes assessed by a board created pursuant to state statute,

(b) asserted against a railroad in reorganization under Section 77 of the Bankruptcy Act, and

(c) accruing subsequent to the adjudication of the railway company as a debtor and the taking over of its properties by the trustee appointed by the Court,

and the Court held that under these conditions questions as to the amount and validity of the tax claims should be submitted to the Bankruptcy Court and settled by it.

The only essential particular in which the facts presented in the St. Francis Levee District cases differ from those in the case at bar is that in those cases there was undoubtedly presented an injunction against the further prosecution of suits which had been filed, by the board of directors for the Levee District, in the state courts, whereas in the case at bar there is no injunction at all, but simply a call upon the taxing authorities to appear in the Bankruptcy Court in connection with a hearing by that Court as to the amount and legality of the disputed assessment. Elsewhere in their argument (at pages 31-33 of their brief) counsel for petitioners contend that the order entered by the District Court on April 11, 1940 (R. 17-21) was an injunction. An examination of the order will, we submit, show most clearly that it was not an injunction and that the District Court (R. 30) and the Court of Appeals (R. 40) were correct in so holding. However, if petitioners are correct in their contention that the order in the present case was an injunction, then there is an absolute parallel between the present case and the last St. Francis Levee District case, 98 Fed. (2nd) 394, in which the Court held that the Bankruptcy Court was not in violation of the provisions of the Act of August 21, 1937 (Section 24 of the Judicial Code as amended), in restraining the enforcement, by the state courts, of liens upon property within the exclusive jurisdiction of the Bankruptcy Court. And this holding of the Court of Appeals is directly in line with the rule laid down by this Court in an opinion by Mr. Justice Brandeis, in *Ex Parte Baldwin*, 291 U. S. 610, at page 615, as follows:

“All property in possession of a bankrupt of which

he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference that Court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that where a court of competent jurisdiction has, through its officers, taken property into its possession the property is thereby withdrawn from the jurisdiction of other courts. Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same. *Julian v. Central Trust Co.*, 193 U. S. 93, 112, 48 L. Ed. 629, 639, 24 S. Ct. 399; compare *Riehle v. Margolies*, 279 U. S. 218, 223, 73 L. Ed. 669, 283 U. S. 319, 75 L. Ed. 1074, 51 S. Ct. 465. The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them. *Murphy v. John Hofman Co.*, 211 U. S. 562, 569, 52 L. Ed. 327, 330, 29 S. Ct. 154, 21 Am. Bankr. Rep. 487. In bankruptcy, this rule applies regardless of whether the property is located in the district in which the bankruptcy proceeding originated."

The cases cited at page 12 of petitioners' brief, viz., *Palmer v. Massachusetts*, 308 U. S. 79; *Railroad Commission v. Rowan & Nichols Oil Company*, 310 U. S. 573, and *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U. S. 362, have no bearing whatever upon the propositions passed on in the *St. Francis Levee District* cases. In *Palmer v. Massachusetts* this Court affirmed the decree of the United States Circuit Court of Appeals for the Second Circuit, in *Converse v. Commonwealth of Massachusetts*, 101 Fed. (2nd) 48, which, in turn, had reversed a decree of its District Court of the United States for the District of Connecticut directing the trustees of the Old Colony Railroad and the New York, New Haven & Hartford Railroad (in reorganization under Section 77) to dis-

continue passenger service at some eighty-eight stations in Massachusetts and five stations in Rhode Island. The Court of Appeals held that the Bankruptcy Court was without authority, under the provisions of section 77, to make such an order, pending an investigation which was then being made by the Department of Public Utilities of Massachusetts, and this Court affirmed the decree of the Court of Appeals, saying (310 U. S., at page 83):

“Plainly enough the District Court had no power to deal with a matter in the keeping of the State authorities unless Congress gave it.”

It is perfectly manifest that this decision affords no reason for overturning the holding of the Court of Appeals in the St. Francis Levee District cases that, by reason of the express mandate of Section 64 of the Bankruptcy Act, the Bankruptcy Court was vested with exclusive jurisdiction to finally hear and determine any question as to the amount and legality of any taxes—the more especially when the Court of Appeals expressly recognized the rule which has consistently been followed in the determination by bankruptcy courts of disputed tax claims, that the question should be determined in accordance with the law of the State, 98 Fed. (2nd), at page 397. See, also, *Henderson County v. Wilkins*, 43 Fed. (2nd) 670, at page 672, wherein it was said:

“Its” (i. e., the Bankruptcy Court’s) “action is not a review of the action of the taxing authorities or a proceeding to enjoin action by them, but a determination under the statute of the amount which should be paid on the claim for taxes from the assets of the estate in its possession.”

And again, *In re Gustav Schaefer Co.*, 103 Fed. (2nd) 237, at page 241:

“The language of the statute is plain that it is the

duty of the court to hear and determine whether the value at which the property of the bankrupt was assessed was proper and correct according to the local taxing statute."

There is nothing whatever in the decisions of the Court of Appeals in the two St. Francis Levee District cases, or in the petition filed by the Trustee in the present case, in reliance upon those decisions, which is in any respect inconsistent with the rule laid down by this Court in *Palmer v. Massachusetts*.

Equally unrelated to the holdings of the Court of Appeals in the St. Francis Levee cases are the two other cases cited by counsel for petitioners at page 12 of their brief, i. e., *Railroad Commission v. Rowan & Nichols Oil Company*, 310 U. S. 573, and *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U. S. 362.

Neither of those cases involved a bankruptcy proceeding at all. In the *Rowan & Nichols Oil Company* case this Court reversed a decree of the District Court of the United States for the Western District of Texas, enjoining the Railroad Commission of Texas from carrying into effect a plan for prorating the production of petroleum in the East Texas field. The injunction against the order was based upon the claim that it was in violation of the Fourteenth Amendment. There were presented conflicting theories of proration, each of which was hotly defended. Under such circumstances this Court held that the judgment of the Court should not be substituted for the plan adopted by the administrative agency which had been vested by law with the responsibility of formulating and enforcing rules for proration.

However, it will scarcely be seriously contended that this decision exempts from judicial review an assessment

made by a state board which, it is charged, is in violation of the mandate of the state statute that all property shall be assessed upon the basis of its true market value. And when such allegedly illegal assessment is made upon property in the custody of the Bankruptcy Court, that court is vested with exclusive jurisdiction to hear and determine the question.

So also, in the case of *N. C. & St. L. Ry. v. Browning*, there was presented solely the question whether a tax assessment, which this Court held not to be discriminatory, was in violation of the Fourteenth Amendment solely because alleged to be excessive. That case came before this Court on writ of certiorari to the Supreme Court of Tennessee, which had held that the assessment in question was not in violation of the Constitution or statutes of that state. This Court was, of course, bound by the holding of the Supreme Court of Tennessee upon those points, and the only question before this Court was the alleged violation of the Fourteenth Amendment.

This Browning decision, most certainly, is no authority for denying to the Bankruptcy Court jurisdiction to hear and determine the validity of an assessment for taxation upon property which is in the custody of that Court, which assessment, it is alleged, is in violation of the statutes and of the Constitution of the state, as well as in violation of the Fourteenth Amendment because discriminatory with respect to other taxpayers generally, and imposing upon the Trustee's property a wholly disproportionate share of the tax burden.

Counsel for petitioners next refer to the decision of the Court of Appeals for the Eighth Circuit in *Thompson v. Terminal Shares*, 104 Fed. (2nd) 1, and say, at page 12 of their brief, that the decisions in the St. Francis Levee District cases "were in effect overruled" by that decision.

Later in their brief, on page 14, counsel for petitioners say: "This case is almost identical with the Terminal Shares case."

A most cursory examination of the opinion in the Terminal Shares case will show the radical and essential difference between the relief sought therein as contrasted with the questions presented in the two St. Francis Levee District cases or in the case at bar. In the Terminal Shares case the trustee was seeking to recover a large sum of money claimed by reason of certain executory contracts entered into by the debtor, prior to its adjudication. The money so sought to be recovered was in the possession of defendants located outside the jurisdiction of the Bankruptcy Court. It was not and never had been in the possession of the trustee. Upon motion of the defendants, the Bankruptcy Court (the United States District Court for the Eastern District of Missouri) entered an order vacating service of process and setting aside the order authorizing such service, which had previously been made in an ancillary and dependent suit filed by the trustee in that court. This action by the Bankruptcy Court was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, which discusses quite fully the extent to which Section 23b of the Bankruptcy Act is to be applied in proceedings under section 77, and concludes as follows:

"We think that the jurisdiction conferred by Section 77 upon the courts of bankruptcy is not to be regarded as general, plenary, nation-wide jurisdiction at law and in equity over all questions incident to the collection of the claims of the debtor against third persons, but is to be considered as the traditional jurisdiction of such courts over the property of a bankrupt, wherever located, freed, however, from those limitations which made ancillary proceedings in other districts necessary, and with the powers which federal

equity courts exercise in receivership proceedings, so far as those powers may be necessary or appropriate in order to preserve and safeguard the property in the actual or constructive possession of debtors and in order to carry on their business pending reorganization."

The excerpt from the opinion in the Terminal Shares case very clearly points out the distinction between the two classes of cases. In determining the amount and legality of tax claims, which would constitute a lien upon property under its control, the Bankruptcy Court may summon claimants who are located outside its jurisdiction. It is, of course, apparent that these claimants should be notified, so that they may appear and present their claims. This was done, in the St. Francis Levee District cases, as to the board of directors of the Levee District, and in the case at bar as to the members of the Arkansas Corporation Commission, the Attorney-General for the state and the collectors for the fifty-one counties. Such issuance of process in support of the jurisdiction conferred upon the Bankruptcy Court by the act, and where necessary to effectuate the purposes of the law, is authorized by paragraph (a) of Section 77 of the Bankruptcy Act, and has been specifically approved by this Court in several cases. Thus, in *Continental Illinois National Bank & Trust Company v. C. R. I. & P. Ry. Co.*, 294 U. S. 648, at page 683, it is said:

"Section 77 deals with railway corporations whose lines and activities are not confined to a single district or a single state, but in numerous instances reach into many districts and many states. * * *. Jurisdiction over reorganization proceedings, however extensive the railway lines may be, is conferred upon a single district court. The usefulness of the section would be greatly minimized and in some instances destroyed if that court were powerless to send its process into any

state when necessary to effectuate the purposes of the law."

To the same effect is the decision of this Court in *Ex Parte Baldwin*, 291 U. S. 610, cited *supra*.

The decision of the Circuit Court of Appeals for the Third Circuit in *Central Railroad Company of New Jersey v. Martin*, 115 Fed. (2nd) 968, cited at page 15 of petitioners' brief, is not in point at all. No act of a bankruptcy court and no provision of the Bankruptcy Act was involved in that case, which was a consolidation of injunction suits brought by a number of railroad companies against certain officers of the State of New Jersey seeking to restrain the enforcement of tax assessments for the years 1934, 1935 and 1936 upon the ground that said assessments were in violation of the Fourteenth Amendment.

Any tax assessment necessarily involves officers of the state or taxing unit and if, in a hearing to determine the amount or legality of a disputed tax imposed under purported authority of the state, the Bankruptcy Court is precluded from giving due notice to the proper state officials, then Section 64 of the Bankruptcy Act is deprived of any meaning whatever. It would certainly be a travesty upon justice for the Bankruptcy Court to enter upon such a hearing without giving the state officials due notice thereof and affording them every opportunity to appear and justify the assessment if they can. No finding by a bankruptcy court that an assessment for state taxes was excessive or illegal, without such preliminary notice to the proper state officials, would be affirmed on appeal. The giving of such a notice, in connection with a hearing by the Bankruptcy Court under the provisions of section 64 of the act, is in no proper sense a suit against the state.

2. Powers of Bankruptcy Court Were Not Exceeded.

Under this head of their argument, at pages 15-20 of their brief, counsel for petitioners present a somewhat detailed analysis of the decision of this Court in *Palmer v. Massachusetts*, 308 U. S. 79. We have already discussed that decision, in connection with a previous reference thereto at page 12 of petitioners' brief. We do not at all question the fact that the Arkansas Corporation Commission is a "statutory State Board of equal state dignity as the Department of Public Utilities of Massachusetts," but we still say that the decision in *Palmer v. Massachusetts* has no controlling force in the present controversy. The decision in that case was based upon the view entertained by a majority of the Circuit Court of Appeals for the Second Circuit, affirmed by this Court, that Section 77 of the Bankruptcy Act conferred no authority upon the Bankruptcy Court to authorize the abandonment of local passenger facilities without the consent of the state authorities having jurisdiction in such matters. It will be noted that paragraph (c) of section 77 only authorizes the abandonment of carrier facilities "with the approval and authorization of the (Interstate Commerce) Commission when required by the Interstate Commerce Act," and the Court of Appeals construed this section as limiting the jurisdiction of the Bankruptcy Court, in an order of abandonment, to the concurrent control of the state regulatory body in matters pertaining to the furnishing of carrier facilities over which the State Board has jurisdiction.

However, there is no question raised in the decision in *Palmer v. Massachusetts* as to the jurisdiction of the Bankruptcy Court in any matter where jurisdiction is unquestionably conferred by the Act of Congress—and it can scarcely be contended that a tax assessment made by the Arkansas Corporation Commission is immune from judicial

scrutiny and determination by the Bankruptcy Court under the authority conferred upon that court by section 64 of the act which relates to any taxes as to which any question arises.

Article I, Section 8, Clause 4, of the Constitution of the United States provides that "Congress shall have power to establish . . . uniform laws on the subject of bankruptcies throughout the United States." This provision has been consistently and uniformly construed by this Court, and by all the subordinate courts of the land, to confer upon Congress plenary and exclusive powers in dealing in bankruptcies, and where Congress, in the exercise of this power, confers upon the Bankruptcy Court jurisdiction to deal with certain matters pertaining to the bankrupt's estate, this has been held to mean an exclusive jurisdiction and to deprive the state courts of any further jurisdiction therein.

In re Wood and Henderson, 210 U. S. 246, at page 254, it was held by this Court that "Congress has the right to establish a uniform system of bankruptcy throughout the United States, and having given jurisdiction to a particular district court to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert claims."

In *United States Fidelity and Guaranty Co. v. Bray*, 225 U. S. 205, at page 217, this Court said:

"We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the deter-

mination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the Trustees and others who are employed to assist them."

And in *Van Huffel v. Harkelrode*, 284 U. S. 225, at page 228, this Court, speaking through Mr. Justice Brandeis, said:

"No good reason is suggested why liens for State taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the Court express authority to determine 'the amount or legality' of any tax * * *. Realization upon the lien created by the state law must yield to the requirements of bankruptcy administration."

And in *New York v. Irving Trust Co.*, 288 U. S. 329, at page 333, it is said: "The Federal Government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."

And in *New Jersey v. Anderson*, 203 U. S. 483, at page 493, this Court, speaking through Mr. Justice Day, in referring to the amount of a franchise tax assessed by a state board, which had been allowed in a lesser sum by the Bankruptcy Court, said: "But we do not think the finding of the State Board is conclusive * * *. Section 64a specifically provides that in case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the Court, with a view to determining the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character * * *."

The decisions of this Court, above cited, cover a long span of years—*New Jersey v. Anderson* having been decided in 1906—more than thirty-four years ago. And in the 1938 revision of the Bankruptcy Act, Congress re-enacted this provision of the Bankruptcy Act, in Section 64 (52 Stat., at page 874), vesting in the Bankruptcy Court jurisdiction to hear and determine the amount or legality of any taxes, as to which any question might arise, in even more comprehensive terms than this provision appeared in the prior act.

In a very recent case, *Kalb v. Feuerstein*, 308 U. S. 433, this Court had before it an appeal from the Supreme Court of Wisconsin which had affirmed a judgment of the Circuit Court of Walworth County sustaining a demurrer to a bill in equity, brought by Kalb, asking for cancellation of a Sheriff's deed to a farm owned by him, restoration of possession and other relief. The Sheriff's deed had been issued under a decree of foreclosure of a mortgage, and the sale was confirmed by the state court while Kalb had pending in the bankruptcy court a petition for composition and extension of time to pay his debts under Section 75 of the Bankruptcy Act (11 U. S. C. A. 203).

In reversing the Wisconsin court, and holding that the confirmation of the Sheriff's deed by the state court and the subsequent ouster of Kalb from possession of his farm were illegal and void, this Court, in a unanimous opinion delivered by Mr. Justice Black, said (page 439):

"Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress, in the exercise of its supreme power over bankruptcy, that no state court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to col-

lateral attack. The states cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land.

“The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy court exclusive jurisdiction over the farmer-debtors and their property, and has by its act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its act in the supreme law of the land which all courts—state and federal—must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone.”

The cases above cited establish, beyond any possibility of question, the rule that where Congress has conferred upon the bankruptcy court jurisdiction to deal with any question pertaining to the estate of the bankrupt, this jurisdiction is exclusive and the courts of the state are thereby deprived of any further jurisdiction which they may have possessed except for the bankruptcy.

And they further establish the fact that, under the provisions of section 64 of the act, whenever any question arises as to the amount or legality of any taxes asserted against a bankrupt estate, the exclusive jurisdiction to hear and determine this question is vested in the Bankruptcy Court.

The cases of Missouri Pacific Railroad Company v. Conway and Vilonia Road District, 280 Fed. 401, and McLaughlin v. St. Louis Southwestern Ry. Co., 232 Fed. 579, cited at page 24 of petitioners' brief, did not, in either

case, involve a bankruptcy proceeding, and neither of those decisions is at all in point on the question now before this Court.

3. The Provision of Section 64 of the Bankruptcy Act, "That in Case Any Question Arises as to the Amount or Legality of Any Taxes, Such Question Shall Be Heard and Determined by the Court," Is Not Inconsistent With Section 77 of the Act, and Is of Governing Force in Proceedings Under Section 77.

With due deference to the learned author of Finletter on Bankruptcy Reorganization, from which book counsel for petitioners quote at some length at page 25 of their brief, it is respectfully submitted that the conclusion reached is erroneous, at least so far as concerns the jurisdiction conferred on the Bankruptcy Court to hear and determine the amount or legality of any taxes as to which any question arises.

As a matter of fact, the quotation from Finletter on Bankruptcy Reorganization, as shown on page 25 of petitioners' brief, does not refer to "the jurisdiction and power of the Court" at all, but refers solely to the rights and priorities of certain classes of creditors.

Paragraph (1) of Section 77, as same appears in the revision of August 27, 1935 (49 Stat., at page 922), is precisely the same as paragraph (n) of the Act of March 3, 1933 (47 Stat., page 1481), and provides as follows:

"In proceedings under this section, and consistent with the provisions thereof, the jurisdiction and powers of the Court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and his property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when debtor's petition was filed."

Now it is perfectly true that there are some rights and priorities of creditors, as provided in section 77, which vary from the rights and priorities as set forth in section 64—and where this occurs the rights and priorities as provided in section 77 will, of course, govern in a reorganization proceeding under that section.

However, there is not the slightest inconsistency, in any respect whatever, between any provision of section 77 and the jurisdiction and power of the Bankruptcy Court to hear and determine any question as to taxes, under the mandate of section 64.

Furthermore, it is most interesting to note that whereas Section 77B of the Act dealing with Corporate Reorganizations other than Railroads (now Chapter X of the 1938 revision) provides that certain sections of the original act, including section 64, shall not apply until there has been an order of liquidation, there is no such provision in section 77, which makes all of the provisions of the original act, as to the jurisdiction and powers of the Court, etc., applicable to a proceeding thereunder unless inconsistent with some provision thereof.

It will be recalled that both of these amendments to the Bankruptcy Act, Section 77, dealing with railroad reorganizations and the present Chapter X (originally Section 77B) dealing with Corporate Reorganizations other than railroads, were enacted very close together, the former on March 3, 1933, and the latter on June 7, 1934, as parts of an effort on the part of Congress to afford relief to the industrial organizations of the Nation during a period of widespread financial distress.

As originally enacted, Section 77B (now Chapter X) provided in paragraph k that

“If an order is entered directing the trustee or trustees

to liquidate the estate * * * (5) debts shall be entitled to priority as provided in Section 64 * * * (but) none of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j) and (m) of Section 57, and subdivisions (a) and (e) of Section 70, shall apply to proceedings instituted under this Section 77B **unless and until an order has been entered directing the trustee or trustees to liquidate the estate**" (48 Stat., at page 921).

As finally amended, in the Act of June 22, 1938, this provision is modified somewhat, and reads:

"Section 102. The provisions of Chapters I to VII inclusive, of this Act shall, in so far as they are not inconsistent or in conflict with the provisions of this Chapter, apply in proceedings under this Chapter. **Provided, however, That Section 23, subdivisions h and n of Section 57, Section 64 (emphasis ours), and subdivision f of Section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of Chapters I to VII, inclusive**" (52 Stat., p. 883). (Emphasis ours.)

Now it is highly significant that, in these two statutes enacted for generally similar purposes, although dealing with different kinds of corporations, and so nearly at the same time, section 64 is expressly excluded from operation in connection with chapter X (formerly section 77B) until there had been an order of liquidation, while, under section 77, no such exclusion is made, but, on the contrary, all of the preceding provisions of the act as to the jurisdiction and powers of the Court (including, because not excepted, section 64) are made applicable thereto with the single proviso that such former provisions of the act shall not be inconsistent with the provisions of section 77.

This was pointed out by the United States District Court for the District of Colorado, *In re Denver & Rio Grande*

Western R. R. Co., 23 Fed. Supp. 298, at page 301, where the Court says: "The proviso in paragraph (k) of Section 77B, 11 U. S. C. A., Section 207 (k), limiting the application of Section 64 (a) to proceedings after an order of liquidation has been made * * * is not contained in Section 77. The omission is significant and indicates, we think, the intent of Congress to confine the proviso to Section 77B cases only."

— And we would repeat that there is not the slightest inconsistency between the provision of section 64, conferring upon the Bankruptcy Court exclusive jurisdiction to hear and determine any question as to the amount or legality of any taxes, and any provision of section 77. Paragraph (c) (7) of section 77 provides for the fixing, by the Bankruptcy Court, of a reasonable time for the filing of claims and for the classification of claims by the Court. Such classification must, of course, recognize the priorities, in accordance with the provisions of this section, but nowhere in said section can there be found any provision which is in the slightest degree inconsistent with the authority conferred upon the Bankruptcy Court by section 64, to hear and determine any question as to tax claims. To the contrary, there are provisions in section 77 which indicate most clearly that this power and authority in the bankruptcy court is wholly consistent with the plan and purpose of that section and highly desirable, if not absolutely essential, in the consummation of a reorganization thereunder. Elsewhere in their brief, at pages 30-31, counsel for petitioners contend that taxes accruing during the reorganization of a railroad, and following its adjudication as a debtor, are to be classed as costs of administration or part of the necessary cost and expense of preserving the estate. In this contention we agree with counsel for petitioners, and we regard this question as settled by the decision of this Court in *Michigan v. Michigan Trust*

Company, 286 U. S. 334, at page 344, where it is said: "Viewing the receivership in its true light as one, not to wind up the corporation, but to foster the assets, we think the annual taxes accruing while the receiver was in charge must be deemed expenses of administration and therefore charges to be satisfied in preference to the claims of general creditors."

And viewing taxes accruing during the Trustee's possession of the property in this light, it will be observed that subsection (e) of section 77 provides that the judge (of the Bankruptcy Court) shall approve the plan if satisfied as to several things, among which is (3) that "the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge," except that allowances for which provision is made in subsection (c), paragraph (12), which may be allowed within such maximum limits as are fixed by the Interstate Commerce Commission, may be paid in securities provided for in the plan if those entitled thereto will accept such payment.

As the bankruptcy court is, unquestionably, vested with jurisdiction to fix and determine the amount of other costs of administration, subject to the right of the Interstate Commerce Commission to fix maximum limits for certain allowances, no good reason can be seen why the bankruptcy court should not hear and determine any question as to the amount or legality of tax claims, which are included as costs of administration. Most certainly the holders of claims in the subordinate classes are very much concerned with the limitation of all items of administration expense to a proper and legitimate basis, because their right to participate in the plan of reorganization may depend upon the amount of administration expense.

And while it is doubtless true, as appellants contend,

that there will be no liquidation in the sense of the ordinary bankruptcy, nevertheless the whole purpose of a reorganization under section 77 would be frustrated if the property cannot be turned over to its ultimate owners, upon final approval of the plan, with definitely known and valid liens, in such aggregate amount as the earnings of the property may enable it to carry. And the Bankruptcy Court is charged with the immediate supervision of the reorganization and the limiting of claims against the property to such claims as are valid and proper, and the classification of all claims according to law.

That the provision of section 64, conferring on the Bankruptcy Court to hear and determine the amount or legality of any tax, as to which question arises, is applicable to a reorganization proceeding under section 77 was, as we have already pointed out, squarely decided in the two St. Francis Levee District cases (cited *supra*). The same holding is reiterated, in a most comprehensive manner, in the opinion of the Circuit Court of Appeals in the present case (R. pp. 38-39), 116 Fed. (2nd), at pages 181-182. The same ruling has been made by the United States District Court for the District of Colorado, *In re Denver & Rio Grande Western Railroad Co.*, 23 Fed. Supp. 298, at page 301.

We of course recognize the fact that the denial by this Court of certiorari does not necessarily imply an affirmance or approval of the holding of the United States Circuit Court of Appeals. However, we would point out the fact that since the denial of certiorari in the first St. Francis Levee District case, on November 22, 1937 (302 U. S. 750), Section 64 of the Bankruptcy Act has been amended, in the Act of June 22, 1938 (52 Stat., at page 874), in terms even more comprehensive than the corresponding provision of the prior act, and since the denial of certiorari in the sec-

ond St. Francis Levee District case, on November 13, 1938, Congress has amended subsection (n) of Section 77, in the Act approved August 11, 1939 (53 Stat., at page 1406), without, in either case, any suggestion of an intent to change the rule as to the jurisdiction and power of the Bankruptcy Court, in proceedings under section 77, to hear and determine any question as to taxes, as construed by the United States Circuit Court of Appeals in the two St. Francis Levee District cases.

In 59 Corpus Juris, at page 1064, the rule is stated that:

“Reenactment of a statute after it has been construed by an intermediate or inferior court is not a legislative adoption of such construction; but where, after a construction of a statute by an intermediate court, the court of last resort has denied a writ of error to review the case, the subsequent reenactment of the statute is strongly persuasive that the legislature adopted it with the construction placed thereon by the intermediate court.”

That rule, we submit, is applicable here.

We would further point out the very unfortunate consequence, in the present case, of a reversal of the rule, in this connection, as laid down in the two St. Francis Levee cases. In reliance upon that rule, the Trustee, in the present case, appealed to the Bankruptcy Court as the proper tribunal to hear and determine the questions presented as to the amount and legality of the disputed tax assessment. He did this promptly—before the tax became due. However, should it now be held that the Bankruptcy Court is not vested with jurisdiction, in a proceeding under section 77, to hear and determine this question, the Trustee is deprived of any right to a judicial review of the disputed assessment, because section 2019 of the Arkansas statutes, which is set out at page 44 of petitioners' brief, only per-

mits an appeal to the Circuit Court of Pulaski County within thirty days after the entry of the order of the Arkansas Corporation Commission. Incidentally, it will be noted that, according to the averment of the Trustee's petition (R. 7), the assessment finally made by the Corporation Commission was certified to the Assessor for the fifty-one counties on December 5, 1939, one day after the final order of that Commission, and long before the expiration of the thirty days allowed for an appeal to the Circuit Court under the provisions of the Arkansas statute.

4. The Jurisdiction to Hear and Determine Any Question as to Taxes, Under the Provision of Section 64a of the Bankruptcy Act, Extends to Taxes Accruing During the Trustee's Possession of the Property.

The provision of section 64a, as in effect prior to the revision or amendment of June 22, 1938 (52 Stat., at page 874), had been construed, in a number of cases, as vesting in the Bankruptcy Court jurisdiction to hear and determine any question as to taxes after the Trustee acquired possession of the property.

Thus, in *Henderson County, N. C., v. Wilkins*, 43 Fed. (2nd) 670, a decision by the Court of Appeals for the Fourth Circuit, the trustee in bankruptcy had complained of the assessed value, for ad valorem taxes, of a hotel property in his hands, and had petitioned the bankruptcy court to reduce same. The taxing authorities had assessed the property for taxation at a valuation of \$250,000. The valuation was reduced, upon a hearing before the referee in bankruptcy, to \$110,000.00, and the findings of the referee were approved and confirmed by the Bankruptcy Court. This action was affirmed, on appeal, by the Circuit Court of Appeals. In the opinion of that Court it is said (page 671):

"The first question raised by appellants is as to the power of the bankruptcy court to reduce the taxes assessed against the property in the hands of the trustee by the taxing officials of the county and municipality. We think, however, that there can be no doubt that the court has this power."

The opinion then quotes Section 64a of the Bankruptcy Act and proceeds as follows:

"Although the property in question was in the hands of the bankruptcy court when the taxes for 1927 and 1928 were levied, it was subject to taxation by the authorities of the county and municipality. *Swarts v. Hammer*, 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060; *Dayton v. Standard*, 241 U. S. 588, 36 S. Ct. 695, 60 L. Ed. 1190. It was the duty of the county and municipal authorities, however, to tax it according to its true value in money. Constitution of N. C., Article V, Sec. 3; Code 1927, North Carolina, Sec. 7971 (46). And, when a question arose as to whether it had been properly valued for purposes of taxation or not, this was a matter for the determination of the bankruptcy court under the statute quoted above, as the question involved was one as to the amount of the tax to be paid from the estate. It is well settled that in determining such a question the court is not concluded by the findings of the taxing authorities. *New Jersey v. Anderson*, 203 U. S. 483, 493, 27 S. Ct. 137, 141, 51 L. Ed. 284; *Truman, Treas., v. Thalheimer* (C. C. A. 9th), 19 F. (2nd) 468; *In re Sheipman* (D. C.), 14 F. (2nd) 323; *In re Simcox* (D. C.), 243 F. 479; *In re United Five and Ten Cent Store* (D. C.), 242 F. 1005. Its action is not a review of the action of the taxing authorities or a proceeding to enjoin action by them, but a determination under the statute of the amount which should be paid for taxes from the assets of the estate in its possession. *In re E. C. Fisher Corporation* (D. C.), 229 F. 316, 318."

And in *Dickinson v. Riley*, 86 Fed. (2nd) 385, there had

been an adjudication of bankruptcy on January 8, 1932. The tax claims in controversy covered taxes for the years 1929-1933, inclusive, including two years during which the trustee was in charge of the property. The taxing authorities contended that the court of bankruptcy had no power or jurisdiction to go into the question of excessive valuation of the property taxed. While sustaining the original assessment, under the evidence in that case, the Court of Appeals held that the great weight of authority was in favor of the right of the bankruptcy court, by reason of the provisions of section 64a, to hear and determine whether the value at which the property was assessed was the proper and correct value as provided by the taxing statutes of the sovereignties or public entities which assessed and levied the taxes.

It was also held by the United States District Court for the District of Colorado, *In re Denver & Rio Grande Western R. R. Co.*, 23 Fed. Supp. 298, that the Bankruptcy Court was the proper forum in which to hear and determine the amount or legality of taxes assessed against a railroad debtor in reorganization under Section 77 of the Bankruptcy Act, and all questions in relation thereto. While it is not so specifically stated in the opinion of the District Court, in the case last cited, it is a fact that the taxes in question, for the year 1937, accrued long after the adjudication of the railroad as a debtor and while the trustees were in possession thereof and operating same—the order of adjudication of that railroad as a debtor having been made on November 1, 1935, and the trustees having been appointed on November 18, 1935.

So also in the two St. Francis Levee District cases (cited *supra*) the taxes involved accrued, subsequent to the adjudication of the railroad company as a debtor, in a reorganization proceeding under section 77.

We are aware of no decision, by any court, holding that this provision of section 64a does not apply to taxes accruing during the trusteeship.

We have remarked, earlier in this argument, that the amendment of Section 64a, in the Act of June 22, 1938, was in even more emphatic and comprehensive terms than the corresponding provision in the prior act. This is true because in the prior act (11 U. S. C. A. 104) this section, after providing that "the Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State," etc., this section went on to provide that "in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the Court"—so that there was, under the prior act, at least some ground for the contention that "any such tax" referred to taxes accruing against the bankrupt prior to adjudication. But, as we have pointed out, the courts uniformly held that this provision also included taxes accruing while the trustee was in possession of the property.

When Congress amended this section in the Act of June 22, 1938, it was presumably in full knowledge of the fact that this Court had denied certiorari, on November 22, 1937, in the first St. Francis Levee case (302 U. S. 750), and under the principle enunciated in 59 Corpus Juris, at page 1064 (cited supra), this fact "is strongly persuasive that the Legislature adopted it with the construction placed thereon" in that case, in which it was held, 91 Fed. (2nd), at page 120, that "the question of the amount and validity of the levee tax lien must be submitted to the bankruptcy court and settled by it." And Congress, when amending this section, did not provide that any question as to the amount or legality of any such tax should be heard and determined by the Court, but instead provided

(52 Stat., at page 874) "that in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court."

At pages 28-31 of this brief, counsel for petitioners contend that the taxes accruing during the Trustee's operation of the property constitute administration expense. As we have stated, under the preceding head of this argument, we agree with them in this contention. But this does not at all help their argument. Section 64a covers other kinds of administration expense, all of which are to be determined by the Bankruptcy Court—and along with these other items of administration expense section 64a confers upon the bankruptcy court jurisdiction to hear and determine any question as to the amount or legality of any taxes.

The case of *Boteler v. Ingels*, 308 U. S. 57, cited at pages 28-29 of petitioners' brief, is not in point at all. That case involved the claim of a trustee in bankruptcy to exemption from penalties provided by a California statute for non-payment, by a certain date, of vehicle license and registration fees when the vehicle is operated without registration. As appears from the opinion of the United States Circuit Court of Appeals for the Ninth Circuit, 100 Fed. (2nd) 915, which was affirmed by this Court, the trustee in bankruptcy had operated certain milk delivery trucks upon the public highways of California for some weeks after the license fees became due, without paying same, and the Department of Motor Vehicles of the State thereupon assessed penalties as provided in the state law, which the trustee refused to pay. The reliance of the trustee was upon Section 57j of the Bankruptcy Act, which provides that "debts owing to the United States or any State or subdivision thereof, as a penalty or forfeiture shall not be allowed except for the amount of the pecuniary loss sustained by the act * * *."

Now Section 57 of the Bankruptcy Act, in its entirety, including every subsection thereof, refers to claims accruing prior to the adjudication. No part of this section refers, in any manner whatsoever, to administration expense or to claims against the trustee—and the Court of Appeals held that this section afforded no protection to the trustee against the state's claim for penalties, and further held, that under the provisions of Section 124a of the Judicial Code (48 Stat. 993) a trustee in bankruptcy conducting a business, as this trustee was, is subject to all state and local taxes "applicable to such business the same as if such business were conducted by an individual or corporation," and that the penalties formed part of the tax for which the trustee was liable. In so holding the decision of the Court of Appeals was affirmed by this court.

Incidentally, it will be noted that the question of the amount or legality of the penalty tax claims involved in the Boteler case was heard initially in the Bankruptcy Court (the District Court of the United States for the Southern District of California) pursuant to a petition filed therein by the trustee. That Court initially decided the controversy in favor of the trustee, and its decision was reversed by the United States Circuit Court of Appeals solely on the merits of the claim.

In the case at bar no claim is asserted by the Trustee that he is not liable for any and all taxes applicable to the property held by him or the business conducted by him, as called for in the laws of the state. But the Trustee does claim that the property in his possession may not properly be assessed for taxation by the Arkansas Corporation Commission on a basis vastly in excess of the true market value thereof, in violation of the Constitution and of the Statutes of Arkansas—and he further contends that, under

the mandate of Section 64a of the Bankruptcy Act, the Bankruptcy Court is the forum, and the only forum, vested with jurisdiction to hear and determine this question.

The question involved in *Thompson v. State of Louisiana*, 98 Fed. (2nd) 108, cited at pages 29-30 of petitioners' brief, is utterly foreign to the question now before the Court. That case involved the liability of the trustee for corporation franchise taxes, which the trustee contended were applicable, under the statute of the state, solely to corporations. Incidentally that question was heard and determined by the Bankruptcy Court.

Also, the decision in *Hennepin County v. M. W. Savage Factories*, 83 Fed. (2nd) 453, and in *Robertson v. Goree*, 29 Fed. (2nd) 261, and in *MacGregor v. Johnson-Cowdin-Emerich*, 39 Fed. (2nd) 574, cited at pages 30 and 31 of petitioners' brief, are utterly unrelated to the question here in issue. Neither of those cases involved any question as to the amount or legality of taxes—the question at issue being solely the obligation of the trustee to pay, as cost of administration, taxes which had accrued upon property which the trustee had used and occupied during the time he held same, and (in the Savage case) for which the Receiver had paid no rental, nor had he paid interest upon a mortgage upon the property. When he had no further use for the property, after having occupied same for several years, the trustee alleged that the estate had no equity in the property and sought to escape payment of taxes which had accrued during his occupancy, under another provision of section 64a, "that no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the Court." The mortgagee in the Savage case asked the Court to order the trustee to secure release of the lien for taxes, on property

so occupied, which had accrued during the trustee's occupancy. No question as to the amount of these taxes was involved at all, nor did either of these cases involve the provision of section 64a that "in case any question arises as to the amount or legality of any tax, such question shall be heard and determined by the Court." Manifestly, these decisions have no bearing whatever upon the question now at issue. This Court held in the Savage case that "to escape the obligation to pay such taxes, a receiver must, within a reasonable time, repudiate the property as a burden upon the estate. He cannot accept the benefits and escape the burdens of operation."

In every case which has thus far been decided by the courts, where this question has been directly presented, it has been held that the jurisdiction conferred upon the bankruptcy court to hear and determine the amount or legality of any taxes, as to which question may arise, applies to taxes accruing during the trustee's possession of the property. As already pointed out, this section was amended by Congress, and reenacted in even more comprehensive form in the Act of June 22, 1938, and this was after the denial by this Court of certiorari in the first St. Francis Levee District case, in which the Circuit Court of Appeals had specifically held that this provision of section 64a applied to taxes accruing during the trusteeship.

5. The Preliminary Order of the District Court, Entered on April 11, 1940, Was Not an Injunction, and, a Fortiori, It Was Not in Violation of Section 24 of the Judicial Code.

The order did not enjoin or restrain the state authorities from doing any act. This is perfectly apparent from a perusal of the order itself (R. 17-21).

Section 24 of the Judicial Code as amended (50 Stat. 738) was enacted on August 21, 1937. This amendment provides that "no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state."

In the present case, the assessment had already been made, in the Commission's order of December 4, 1939 (R. 7). It is true that the Court proposed, under the jurisdiction conferred upon it by Section 64a of the Bankruptcy Act, to hear and determine the amount or legality of such assessment, but there was nothing in the Court's order which enjoined or restrained the Arkansas Commission from performing any act in connection with the assessment.

Precisely the same remark applies to the levy of taxes pursuant to the assessment. This levy had already been made when the Trustee's petition was filed (R. 11), following the certification of the assessment by the Corporation Commission to the several county assessors on December 5, 1939—the day after the final assessment was made by the Commission (R. 7). Nothing in the Court's order enjoined or restrained the county authorities from performing any act in connection with the levy of taxes.

And the same thing is true as to the collection of the taxes. They had not been collected when the Trustee's petition was filed and the Court's order entered on April 11, 1940. They were not even due at that time (R. 14). The Trustee challenged the assessment, and the resulting tax, because he believed same to be exorbitant and illegal, but his petition did not ask, nor did the Court's order grant, any injunction or restraint against the officers of

the state or of the counties in connection with the collection of the taxes.

It is perfectly true that the Bankruptcy Court would not, presumably, have permitted any forcible seizure or sale, by the state or county authorities, of property under the Court's custody (*Ex parte Baldwin*, 291 U. S. 610, at page 616), but this was because of the inherent power of that Court, as conferred upon it by Congress, and not because of anything prayed in the Trustee's petition. This protection of the property under its custody from seizure or sale for taxes would have been exercised by the Court had the Trustee's petition never been filed.

All that the Trustee's petition did was to request the Bankruptcy Court to hear and determine the amount and legality of these taxes which, the petition averred, were based upon an assessment made in violation of the Constitution and of the statutes of the State of Arkansas. Pending the determination of this question, in order to avoid undue embarrassment to the taxing districts, the Trustee asked leave of the Court to pay taxes for the year in question in an amount conceded to be based upon a legitimate assessment—and the petition further prayed, in paragraph 14 (R. 15), that the question as to the disputed balance be heard and determined as expeditiously as possible.

This, we submit, was the orderly and expeditious manner of disposing of the dispute. An order of the Bankruptcy Court to pay all or some specified amount of the balance in dispute would, of course, have been complied with, subject to the right of either party to appeal therefrom, and no occasion for conflict between the Bankruptcy Court and the taxing authorities by reason of an attempted seizure or sale of the property, would or could have existed. The delay, of almost a year, which had occurred,

has been due entirely to the procedure which the taxing authorities have elected to pursue in an effort to escape any judicial review of the assessment in question.

In *Henderson County, N. C., v. Wilkins*, 43 Fed. (2nd) 670, at page 672, in referring to a similar petition filed in a bankruptcy proceeding by the trustee, and to the jurisdiction and power of the bankruptcy court in dealing with such petition, the Court said: "Its action is not a review of the action of the taxing authorities or a proceeding to enjoin action by them, but a determination under the statute of the amount which should be paid on the claim for taxes from the assets of the estate in its possession."

It is perfectly manifest that if respondent's contention, that Section 24 of the Judicial Code interposes a barrier to a proceeding of this character, is correct, then the provision of Section 64a of the Bankruptcy Act, conferring upon the Bankruptcy Court jurisdiction to hear and determine the amount or legality of any tax as to which any question might be raised, is utterly meaningless, because such a hearing and determination by the Bankruptcy Court in a liquidating bankruptcy proceeding, as to taxes accruing prior to the adjudication, would be no more or no less "an injunction" than is the present proceeding. And we would again point out that section 64a in its present form (52 Stat. 874) was enacted by Congress almost a year after the last amendment of Section 24 of the Judicial Code (52 Stat. 738) was enacted. And section 64a in its present form was enacted seven months after this court had denied certiorari, on November 22, 1937, in the first St. Francis Levee District case, 91 Fed. (2nd) 118, in which the United States Circuit Court of Appeals had specifically held that "the question of the amount and validity of the levee tax lien must be submitted to the Bankruptcy Court and settled by it."

The first St. Francis Levee District case involved taxes which had accrued during the trustee's possession of the property in a reorganization under section 77; and in that decision there was also presented an injunction in another federal court brought by the trustee, pursuant to instructions from the Bankruptcy Court, restraining the further prosecution of suits in the state courts of Arkansas. And this injunction was sustained on appeal.

In the second St. Francis Levee District case, 98 Fed. (2nd) 394, precisely similar facts were presented, except that the injunction therein was issued direct by the Bankruptcy Court, and this injunction was likewise upheld by the United States Circuit Court of Appeals, which held that, in a bankruptcy proceeding, Section 24 of the Judicial Code interposed no barrier thereto. And certiorari was again denied by this Court (305 U. S. 647).

We say, then, that while the petition of the Trustee in the present proceeding, and the order of the Bankruptcy Court therein, did not constitute an injunction, a fortiori was the Court's order not in violation of Section 24 of the Judicial Code. The conclusive answer to this contention of petitioners is most clearly stated in the opinion of the United States Circuit Court of Appeals in the case at bar (R. 40-41).

6. Even Though the Arkansas Statutes May Provide for a Judicial Review in the State Courts, of the Assessments Made by the Corporation Commission, This Does Not Deprive the Bankruptcy Court of the Jurisdiction to Hear and Determine the Amount or Legality of Any Tax as to Which Any Question May Arise.

We would remark, in passing, that there is grave doubt as to the adequacy of the provision of the Arkansas statute for a judicial review in the State Court, under the facts

existing in the present case. The statute provides for an appeal to the Circuit Court of Pulaski County within thirty days after the entry of record of the Arkansas Corporation Commission. As is averred in the Trustee's petition (R. 7) the final order by that Commission was made on December 4, 1939, and upon the following day, December 5, 1939, this assessment was certified by the Commission to the collectors for the fifty-one counties, who (R. 11) promptly extended same upon their tax rolls. The Arkansas statute is silent as to the effect, upon the liens thereby created, of a subsequent appeal to the Circuit Court of Pulaski County, even though such appeal had been prosecuted within the thirty-day period.

And it is most definitely certain that the procedure outlined in the Arkansas statute would not realize, for the several taxing units, the amounts which might ultimately be found due by the state courts with anything like the promptness which would be realized by an order from the Bankruptcy Court to the Trustee following a hearing and determination by that court of the amount properly due in response to the prayer of the Trustee's petition. As will be observed from the preliminary order of the Bankruptcy Court (R. 18-20) the Trustee was instructed to pay taxes for the year in question, aggregating \$620,645.03, pending the final determination of the total amount properly due.

However, entirely irrespective of the question as to the adequacy of the right of judicial review of an assessment by the Arkansas Corporation Commission, as ultimately provided by the statutes of that state, under the legislative history set forth on pages 33-34 of petitioners' brief, it is most certain that such right to judicial review in the state courts could not, and did not, deprive the Bankruptcy Court of the jurisdiction to hear and determine the amount or legality of any taxes, as to which question might arise, under the mandate of Section 64a of the Bankruptcy Act.

The law upon this question is most succinctly stated in the opinion of the United States Circuit Court of Appeals, in the present case (R. 41), as follows:

“Whether or not there are state laws under which the trustee in bankruptcy might obtain a determination by the state courts of the amount or validity of the disputed state taxes allowable as liens and as part of the cost and expense of administration in bankruptcy is immaterial. The power to make the determination has been expressly conferred upon the bankruptcy court by special provision which is an integral part (fol. 52) of the plan of bankruptcy administration of the property brought within its exclusive jurisdiction.”

This excerpt from the opinion of the Court of Appeals is abundantly sustained by numerous decisions of this Court, a few of which have been heretofore cited in this argument under the caption “Powers of Bankruptcy Court.” We would especially again direct attention to the very recent decision of this Court in *Kalb v. Feuerstein*, 308 U. S. 433, from which we quoted at some length under that head. And we would remark that what was said by this Court in that opinion, with respect to the exclusive jurisdiction of the Bankruptcy Court in dealing with farmer-debtors, applies with equal force to the exclusive jurisdiction of a bankruptcy court, within the authority conferred by the act, when dealing with a liquidation in bankruptcy, under the original act, or with the reorganization of a railroad-debtor under section 77.

None of the decisions cited by petitioners, at pages 34-37 of their brief, deal with a bankruptcy proceeding at all, and they are, therefore, utterly inapplicable to the question now under consideration.

7. The Issue Presented in the Trustee's Petition Is Clearly Justiciable.

The cases upon which petitioners chiefly rely, by their contention, at pages 39-42 of their brief, that the issue presented in the Trustee's petition is nonjusticiable, i. e., *Railroad Commission v. Rowan & Nichols Oil Company*, 310 U. S. 573; *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U. S. 362, and *Central Railroad Company of New Jersey v. Martin*, 115 Fed. (2nd) 968, all involved controversies in which the jurisdiction of the federal courts was invoked solely in reliance upon the claim that the order or finding of the State Board of which complaint was made was in violation of the Fourteenth Amendment to the Constitution of the United States.

Passing for the moment the question whether the assessment of Trustee's property by the Arkansas Corporation Commission was in violation of the Fourteenth Amendment, it will be observed that this is by no means the only "question as to the amount or legality of the taxes" in dispute which is presented by the Trustee's petition. We have already referred, in opening statement of this brief, to the averments of the petition, and will here again only briefly point out that the petition alleges that, whereas the Constitution of Arkansas (Article XVI, Section 5) provides that "all property subject to taxation shall be taxed according to its value," and Section 2044 of the Arkansas Statutes (set out in appendix, on page 44 of petitioners' brief) provides that all assessments made by the Arkansas Commission "shall be made upon the consideration of what a clear fee-simple title thereto would sell for under conditions under which that character of property is usually sold," and Section 2048 of the Arkansas Statutes (set forth in appendix hereto) provides that "the true market or actual value of the entire property"

shall first be ascertained and then the state's portion, of a facility operating in different states, allocated in the manner provided in the statute, as a matter of fact the assessment, both for the year in question and for years prior thereto, was very greatly in excess of the actual value thereof, after giving consideration to an equalization factor of the same amount as that applied to other classes of property in said state.

Petitioners correctly say, at page 4 of their brief, that there is no controversy as to either the allocation factor or the equalization factor used in arriving at the assessment—and the entire controversy hinges upon the **System Value** as found by the Arkansas Corporation Commission of the railroad properties of the Missouri Pacific Railroad, now held and operated by the Trustee subject to the orders of the Bankruptcy Court—a system operating in eight states, i. e., Arkansas, Colorado, Illinois, Kansas, Louisiana, Missouri, Nebraska and Oklahoma.

It will also be noted from a comparison of paragraphs 8 (R. 9-10) and 10 (R. 11) of the Trustee's petition that the excessive assessment of \$11,220,000 (\$28,050,000 as actually made as contrasted with a maximum proper assessment of \$16,830,000) is based upon a system value, as found by the Commission, of \$246,970,234, which is **more than one hundred million dollars** in excess of "the true market or actual value" of the system on January 1, 1939, which the Arkansas statute requires to be the basis for the assessment of the property.

It has been expressly held by this Court, in *Dawson v. Kentucky Distilleries*, 255 U. S. 288, that in a proceeding over which the federal court has jurisdiction, an assessment for state taxation, found to be in violation of the Constitution or statutes of the assessing state, will be annulled.

Most certainly the Bankruptcy Court has jurisdiction to hear and determine the amount or legality of a tax sought to be imposed upon property in its custody; as to which question is raised, and in making this determination that Court will give due consideration to the statute of the state, under which the tax is sought to be imposed. And where the disputed tax is shown to be in violation of the statutory requirements of that state, the Bankruptcy Court will readjust the tax in conformity thereto.

New Jersey v. Anderson, 203 U. S. 483;
In re Gustav Schaefer Co., 103 Fed. (2nd) 237,

wherein the Court says:

"This provision" (section 64a of the Bankruptcy Act) "is found in the Act of July 1, 1898, 30 Stat. 563, and courts have ruled with unanimity that the Bankruptcy Court is not irrevocably bound by an irrebuttable presumption of validity and correctness of the assessment made by the taxing authorities. The language of the statute is plain that it is the duty of the Court to hear and determine whether the value at which the property of the bankrupt was assessed was proper and correct according to the local taxing statutes."

The decision of this Court in *Rowley v. Chicago & North Western Railway Company*, 293 U. S. 102, to which reference is made at page 38 of petitioners' brief, did not involve any dispute as to the system value of the railroad, but solely the question of a proper allocation factor for that portion of the property within the State of Wyoming. As a matter of fact, both the State Board and the Railroad Company were in accord, in that case, that the system value should be determined by the market value of the railroad's stocks and bonds and its capitalized net operating income, averaged over a five-year period—a method

for the determination of system value which has been approved in numerous cases, including

Great Northern Ry. v. Weeks, 297 U. S. 135;

Chicago & Northwestern Ry. v. Eveland,
13 Fed. (2nd) 442;

Bailey v. Megan, 102 Fed. (2nd) 651,

and which, if applied in the present case, produces a system value more than one hundred million dollars beneath that used by the Arkansas Corporation Commission in arriving at its final assessment.

The cases above cited all involved injunction suits, which would possibly not now be entertained since the enactment of Section 24 of the Judicial Code in its present form. However, these decisions are certainly indicative of the views entertained by the courts as to a proper basis for determining the true market value of a railroad system.

Reverting for a moment to the decision in the Rowley case, this Court therein said (293 U. S., at page 110): "The determination is to be made in the exercise of a reasonable judgment based on facts so pertinent and significant as to be of controlling weight as indications of the value of the property."

That is precisely what the Trustee's petition, in the present case, avers that the Arkansas Corporation Commission did not do. On the contrary, the petition alleges that the Arkansas Commission arrived at the system value of the property by the use of methods which utterly failed to give consideration to conditions and values of railroad property as of January 1, 1939 (the assessment date under the statute), and which have been condemned by the courts, not only in the cases above cited, but also by this Court in numerous cases involving the determination of

true market value, apart from railroad assessments, such as

Standard Oil Company v. Southern Pacific Company, 268 U. S. 146;

A. B. & C. R. R. Co. v. United States, 296 U. S. 33.

Petitioners cite no decision of the Arkansas courts holding that true market value, under present-day conditions can be determined upon the basis of the original cost of the property, many years ago, or the amount which would be necessary to reproduce the property, and we confidently assert that no such decision can be found. Most certainly such factors have been uniformly condemned by this Court and by the United States Circuit Courts of Appeal, as improper determinants of present-day true market value. The Trustee's petition alleges, and the Trustee is prepared to prove, that the system value used by the Arkansas Commission in arriving at its assessment was enormously excessive and "manifestly outside of the range of the facts, so as to amount to an arbitrary abuse of power."

Petitioners have much to say as to the indulgence which should be accorded to a finding of the Corporation Commission. This, of course, involved a question of proof, and, we submit is premature in passing upon the question whether the petition presents a justiciable controversy. Most certainly, where the petition alleges, as the Trustee's petition does, that the assessment made by the Arkansas Corporation Commission is in violation of the Constitution of Arkansas, and of the statute by which the Commission is created and by which its assessments must, of course, be governed, a justicable controversy is presented.

Petitioners concede that this assessment is subject to judicial review but insist that this review should be in the Arkansas courts. This insistence, as we have pointed out, is manifestly predicated upon the fact that if a review

thereof, by the Bankruptcy Court, is now denied, they will escape any judicial review of this assessment.

And we would again remark that an alleged over-assessment, based upon a valuation placed by the State Commission on an interstate railroad system operating in eight states, which is in excess of the true market or actual value of that system to the extent of more than one hundred million dollars, does not present a question solely of local state concern.

So far as concerns the allegation that the assessment of the Trustee's properties by the Arkansas Commission was in violation of the Fourteenth Amendment, petitioners urge that this averment is rendered untenable by the decision of this Court in *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U. S. 362.

As we read the opinion in the *Browning* case, it does nothing of the sort. It appears from that opinion that there is nothing in the Constitution or statutes of Tennessee prohibiting the application of different yardsticks of value to different classes of property, and this Court points out that the petitioner in the *Browning* case (the railway company) makes no claim that its property is singled out from among other public service corporations for discrimination. The opinion in that case also refers (page 317) to the previous decision of this Court in *Great Northern Railway v. Weeks*, 297 U. S. 135, as standing alone in striking down "a nondiscriminatory assessment simply because it was thought excessive."

But in the present case, as has been pointed out, the Constitution of Arkansas specifically prohibits the application of different yardsticks of value for different classes of property. It prescribes true value for all alike, and the statute prescribes this same basis of value, with even

greater particularity, for railroad property and other property assessed by the Arkansas Corporation Commission. And in the absence of any constitutional or statutory warrant for such procedure, to assess the Trustee's properties at a figure vastly in excess of their true market value and thereby impose upon the Trustee an undue and disproportionate share of the tax burden, as compared with other property in the state, would certainly appear to constitute a violation of the Fourteenth Amendment. Such has been the holdings of this Court in numerous cases. Thus, in *Kansas City Southern Ry. Co. v. Road Improvement District No. 6*, 256 U. S. 658, it was held, in a unanimous opinion, that (page 661):

“Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of law must be extended to all,”

and also in

Road Improvement District No. 1 v. Missouri Pacific R. R. Co., 274 U. S. 188, at page 194,

wherein it was held that

“Our conclusion is that the assessment against the railroad is unreasonably discriminatory in so far as it is based on personal property, and in this respect violates the equal protection clause of the Fourteenth Amendment, and it is otherwise so excessive as to be a manifest arbitrary exaction and in violation of the due process of law clause of the same amendment.”

However, wholly apart from the allegation of a violation of the Fourteenth Amendment, the averments in the Trustee's petition, as to the assessment being in violation of the statutes and of the Constitution of Arkansas, present a

justiciable controversy, calling for consideration and determination by the Bankruptcy Court under the provisions of Section 64a of the Bankruptcy Act.

The decree of the United States Circuit Court of Appeals, affirming the interlocutory order of the Bankruptcy Court, should be affirmed and that Court permitted to hear and determine the amount or legality of the disputed tax.

Respectfully submitted,

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APPENDIX.

Section 2048, Arkansas Statutes.

(Pope's Digest of Statutes of Arkansas for 1937.)

Section 2048. Apportionment of Assessed Value. The Commission shall assign or apportion the assessed value of the property of all persons, firms, companies, co-partnerships, associations and corporations; which it is required to assess, in the following manner:

There shall be deducted from the true market or actual value of the entire property, tangible and intangible, ascertained as in this Act provided, the true market or actual value, as ascertained from the information furnished by report, or otherwise, of all real and personal property of such company not used in its business as a public utility, and the remainder shall be treated as the true market or actual value of all its property, tangible and intangible, actually used or employed in its public utility business.

The Commission shall then ascertain and fix the value of the total utility operating property, tangible and intangible, in this State, by taking such proportion of the true market or actual value of the entire operating property, tangible and intangible, of such company, actually used in its public utility business, as its total lines within this State bear to the total lines both within and without this State, or as its total receipts or income from operation within this State bear to its total receipts or income from operation both within and without this State, or by using such other recognized method, or combination of methods, as will, in the judgment of the Commission, result in a just and equitable apportionment to this State of its due proportion of the value of the total utility operating property,

When the value of the total utility operating property, tangible and intangible, in this State has been determined; or when the property and operations of such company is wholly within this State, there shall be assigned or apportioned to the several counties, towns, school districts and other taxing districts through or in which such company operates the value of all real estate and all tangible personal property which had a fixed situs therein on the first day of January of the current tax year; and the remaining part of the assessment, if any, shall be assigned or apportioned among the several taxing districts in proportion to the value of the tangible property assigned or apportioned thereto. Provided, that the value assigned to rolling stock of street, suburban or interurban railroad, railroad and bus line companies shall be apportioned among the several counties, towns and school districts through or in which such company operates in proportion to the mileage operated therein, and provided, further, that the value of the personal property of any express or sleeping car company shall be apportioned among the several counties, towns, and school districts through or in which such company operates in proportion to the mileage operated therein.

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Railroad Reorganizations—State Tax Claims. APR 3 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 715, OCTOBER TERM, 1940.

THE ARKANSAS CORPORATION COMMISSION,
et als.,

Petitioners,

vs.

GUY A. THOMPSON, Trustee,

Respondent.

On *Certiorari* to United States Circuit Court of Appeals,
Eighth Circuit.

**BRIEF FOR THE STATE OF NEW JERSEY
AS AMICUS CURIAE.**

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April 3, 1941.

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IN THE

Supreme Court of the United States

No. 715, OCTOBER TERM, 1940.

THE ARKANSAS CORPORATION COM-
MISSION, *et als.*,

Petitioners,

vs.

GUY A. THOMPSON, Trustee,
Respondent.

On *Certiorari* to
United States Circuit
Court of Appeals,
Eighth Circuit.

**BRIEF FOR THE STATE OF NEW JERSEY
AS AMICUS CURIAE.**

Opinions Below and Jurisdiction.

The opinions below are set forth at page 8 of Petitioners' brief, and the basis of jurisdiction is stated at page 7 of the petition for writ of *certiorari*.

Statement of the Case.

For a complete statement of the case in the above entitled proceeding, the State of New Jersey relies upon petitioners' brief. This statement is confined to the aspects which affect its interest in the questions involved in the decision of the Eighth Circuit (116 Fed. (2d) 179), whose judgment is here for review.

That judgment was predicated upon a petition, filed by the Trustee of a railroad company in reorganization (under section 77 of the bankruptcy law) in the United States District Court, Eastern Division, Eastern Judicial District of Missouri, praying for a determination under section 64(a) (11 U. S. C. A. Sec. 104 (a), p. 123), of the amount and legality of taxes for 1939, levied by the State of Arkansas and certain political subdivisions thereof upon the property of the Debtor after the petition was filed, and while said property was in the possession, control and operation of the Trustee appointed by said court (R. 37).

Statement of Interest.

The particulars of the interest of the State of New Jersey in this case are here set forth.

It has filed claims for unpaid balances of taxes (aggregating \$14,266,936.19 exclusive of interest) levied and accrued prior to the filing of petitions of the Debtor railroad companies in reorganization proceedings under Section 77 of the bankruptcy law. The names of the companies, dates of filing petitions, the amount of the tax claims, the tax years involved, dates of filing claims, and the courts, respectively, are set forth in Appendix "A" attached hereto.

In each of those cases issues have been joined on the proofs of claims, objections thereto and reply (or answer) to the objections.

It was not necessary to file these claims (*Johnson, Bankruptcy Reorganization* (1936) sec. 508, p. 442; *In re Kallak*, 147 Fed. 276), but they were filed in aid of reorganization plans; to inform the Interstate Commerce Commission, the Court, the Trustees and the parties interested, of the extent of the tax liens upon the property of the Debtors, respectively, which were necessary to be considered in such a plan. The status of the several tax claims is as follows:

Susquehanna Reorganization.

The petition was presented to, and the approval order was signed by, Honorable William Clark, District Judge. On June 25, 1938 he was appointed to the United States Circuit Court of Appeals, Third Circuit, but has since continued to exercise the jurisdiction of District Judge over this proceeding.

The controversy over this claim was submitted to the court for determination on a stipulated record, filed June 30, 1938, followed by briefs from both sides. No decision has yet been rendered.

On March 30, 1939 the Trustee filed a petition respecting the payment of taxes accruing before, and others accruing since, the filing of the reorganization petition, praying for instructions as to the course which he should pursue; whether he should prosecute appeals or other litigation to contest taxes levied since his appointment for the years 1938 and 1939; and what payments of taxes, if any, he should make out of funds in his hands. On the return of an order to show cause (April 5, 1939) the District Judge read, and issued, a "Memorandum", (a true copy of which is attached hereto as Appendix "B"), concluding with instructions—

"In the meantime, the trustee will withhold payment of any taxes now claimed."

On December 11, 1940, the Trustee filed a petition for instructions as to whether he should join certain other railroad companies in a petition to the Circuit Court of Appeals, Third Circuit, for a rehearing on its judgment, entered November 27, 1940, (*Central R. R. Co. v. Martin*, 115 Fed. (2d) 968) sustaining the assessments and taxes levied against this Debtor, and others, for the years 1934, 1935 and 1936 (included in the proof of claim) or in any other proceedings connected with said appeals; what course, if any, he should take in connection with any suits, proceedings or litigation concerning said taxes involved for the years 1933 to 1937, both inclusive (involved in the proof of

claim) in any court or tribunal other than in the District Court in this reorganization proceeding.

On December 12, 1940, the District Judge entered an order (a true copy of which is attached hereto as Appendix "C") reciting that said court has jurisdiction to hear and determine the amount and legality of the taxes in question, and directing the Trustee not to join in said petition for rehearing, or in any other proceedings connected with said appeals. Accompanying said order, the District Judge issued a "tentative" opinion in which he says that "the State's original claim has been held suspended and awaiting events." *In re New York, S. & W. R. Co.*, 36 Fed. Supp. 158, 161.

Erie - New Jersey & New York Reorganizations.

No hearings have been called on the State's claims in these proceedings, because (as stated by Counsel for the Trustees to the State's representatives) of pending litigation of these taxes in the civil courts and the pending litigation of the same questions in other jurisdictions, particularly in the above entitled cause (*Arkansas Corporation Commission v. Thompson*, 116 Fed. (2d) 179) in the Eighth Circuit and on review in this court.

Central of N. J. Reorganization.

The petition was presented to, and the approval order was signed by, Honorable Guy L. Fake, District Judge. No hearings have been called on the State's claim for taxes.

On January 7, 1941, the Trustees filed a petition reciting the intention of certain other railroad companies to file the

above mentioned petition for rehearing in the United States Circuit Court of Appeals, Third Circuit, and if unsuccessful therein, to apply to this Court for writ of *certiorari* to review that court's judgments entered November 27, 1940; the above mentioned decision of the Eighth Circuit involving the same issues as are involved in the State tax claims; and the intended application to this Court for writ of *certiorari* to review the same, and praying for "direction, instructions and protection" as to whether they should join in the proposed petition for rehearing.

On said January 7, 1941, the district judge entered an order (a true copy is attached hereto as Appendix "D") instructing the Trustees not to join in the proposed petition for rehearing or to participate in any reargument, if granted, and reserving for future consideration any and all other questions arising or which may arise in connection with the rights and duties of the Trustees and the Debtor in respect to taxes assessed against Debtor's property for 1934, 1935 and 1936. At that time, the District Judge and counsel for the Trustees discussed the litigation of the Arkansas taxes in the Eighth Circuit as involving the same, or some of the same, issues as are involved in the tax claims filed by the State of New Jersey.

On January 8, 1941, the Trustees filed a petition reciting notice of the primary assessment of Debtors property for the year 1941; the statutory provision for review thereof on complaint before the State Tax Commissioner; that resort to the administrative remedies available to said Trustee to review the assessments and taxes for 1941 would result in a duplication of proceedings, expense and effort and would unduly delay, interfere with and burden the

prompt reorganization of the Debtor, and praying for "direction, instruction and protection" as to whether a complaint should be filed with the State Tax Commissioner to review said primary assessment.

On January 8, 1941, the District Judge entered an order (a true copy of which is attached hereto as Appendix "E") instructing the Trustee not to file with the State Tax Commissioner a complaint against the primary assessment for the year 1941, and reserving for future consideration any and all questions arising or which may arise in connection with the rights and duties of the Trustees and of the Debtor in respect to the taxes which may be assessed against the Debtor's property for that year.

On January 29, 1941 the Trustees filed a petition reciting the assessment and taxes of the Debtor's property for the year 1939; that the Debtor had appealed therefrom to the State Board of Tax Appeals on which hearings had been held; that said hearings were at the stage at which Debtor was entitled to introduce its rebuttal testimony; that prior to the qualification of the Trustees the Debtor had applied for instructions as to whether it should prosecute its appeal of the 1939 assessment and taxes to the State Board of Tax Appeals and whether pending determination the Debtor should pay part of the taxes levied for that year; that the court had, on December 13, 1939, instructed the Debtor to pay 60% of the tax bill for that year; that the Debtor had paid that percentage of the taxes accordingly; that the State of New Jersey had filed a tax claim in the Central reorganization proceeding for unpaid balances of taxes for the years 1932 to 1939 both inclusive; that the Trustees intended to file objections to

that claim and to bring it before the court for hearing and determination as to amount and legality of the taxes levied for each of said years; that the Trustees were uncertain as to whether the Debtor should pursue its appeal before the State Board of Tax Appeals for the purpose of obtaining an early determination therein, and praying for instructions as to the course they should pursue with respect to the further prosecution of the Debtor's appeals on taxes levied for the year 1939.

On January 31, 1941 the District Judge entered an order (a true copy of which is attached as Appendix "F") reciting that doubt exists as to whether the Debtor should proceed with said tax appeal in view of the fact that the State of New Jersey had filed a tax claim including taxes for that year, "where it may be found that this court has and should exercise exclusive jurisdiction under Section 64(a) and other provisions of the bankruptcy act"; that questions thus raised present intricacies and cannot be answered before Monday next, (February 3, 1941), since it requires a careful study of the statutory and case law on the subject and a submission of briefs to the court. The court directed that "pending such study and filing of briefs the Debtor should appear before the State Board of Tax Appeals and make known the intricacies with which this court, at short notice, is confronted as to the law on the subject, and respectfully request an adjournment for two weeks within which time the question presented may be studied and answered."

On February 13, 1941, the District Judge entered an order (a true copy of which is attached hereto as Appendix "G") instructing the trustees to continue to prosecute the Debtor's appeals from taxes from 1939 to a final determina-

tion before the State Board of Tax Appeals and ordering "that if any question arises as to the amount or legality of any tax assessed against the Debtor, or as to any tax claim heretofore or hereafter filed against the Debtor's estate or against the Trustees of the property of the Debtor, such questions shall be heard and determined by this court."

The Issues in the Arkansas Case,

The questions of law in direct issue before the court below touching the interests of the State of New Jersey, as contended by petitioners, are that:

1. Section 64(a) has no application in a reorganization proceeding under section 77 of the bankruptcy law.
2. Section 64(a) is applicable only to taxes which have accrued against the Debtor prior to the filing of its petition for reorganization under section 77 (*R. 38*).

Other issues of law incidentally involved are that:

3. The District Court lacked jurisdiction to hear and determine the amount or legality of said taxes until after the Trustee had exhausted the administrative, and other, remedies for review thereof provided by state law.
4. If the court possessed such jurisdiction it should have withheld its exercise thereof until the Trustee had exhausted the administrative, and other, remedies provided by state law, and until the amount and legality thereof had been thus established according to the constitution and laws of the state.

Each of the four issues were decided by the court below adversely to the form above stated.

Common Issues.

Since the claims filed by the State of New Jersey are for taxes accruing against the Debtors prior to the filing of their petitions for reorganization, issue number 1 is the only one of those above named which is directly involved in said claims. However said claims also involve other issues (which will be referred to as numbers 5 and 6) namely:

5. If the District Court has jurisdiction under section 64(a) to hear and determine the amount and legality of said taxes, it has no jurisdiction, power or authority to make a new assessment or tax levy, or to revise or reduce the amount of assessments or taxes lawfully made or levied according to the constitution and laws of the State of New Jersey, or to abate or reduce the amount of interest thereon, or to change the interest rate, prescribed by the railroad tax act of the State of New Jersey.

6. All of the grounds of objection stated, and all of the issues of fact and law raised, or necessarily involved, in the objections to said claims, respectively, with respect to the amount and legality of said assessments and taxes are *res judicata* in the proceedings on the New Jersey tax claims, respectively.

The State of New Jersey does not subscribe to petitioner's contention as stated in issue number 2, because it stands on issue number 1, and contends that section 64(a) has no application to taxes levied and accrued either before or after the reorganization petition is filed.

Issues numbered 3 and 4 are not involved in the tax claims of New Jersey as filed, because the Debtors, or the

Trustees, have exhausted the remedies prescribed by law to review their assessments and taxes each year from 1932 to 1936, both inclusive, and have, to date, pursued the remedies prescribed by law to review their assessments and taxes for each of the years 1937, 1938 and 1939.

However, issues 3 and 4 are important to the State of New Jersey because of the orders above mentioned (and attached hereto as appendices) instructing the Trustees of some of the Debtors not to pay any part of the taxes levied and accrued since the petitions for reorganization were filed, and one of those orders instructed the Trustee not to pursue, or exhaust, the remedies prescribed by law to review, or contest, assessments or taxes for the year 1941.

Reasons for This Brief.

The reasons for filing this brief *amicus curiae* are—

(a) Several of the issues in the above entitled case are the same as those involved in the contest of the tax claims filed by the State of New Jersey, as listed in Appendix "A" attached hereto.

(b) The replies (or answers) of the State of New Jersey to the Trustees' objections to the tax claims in each of the reorganization proceedings listed on Appendix "A", contained the following, or similar words:

"This court has no jurisdiction, power or authority to make a new assessment or tax levy, or to revise or reduce the amount of the assessments or taxes, or any of them, or to abate or reduce the amount of the legal interest which has accrued, or which may hereafter accrue, to date of final payment,

upon the amount of taxes in default on any due date, as prescribed by the railroad tax acts of the State of New Jersey."

Since this contention was argued and briefed nearly three years ago in the Susquehanna case, the District Judge has twice ascribed the delay of decision to uncertainties, and has stated that he was "awaiting events" (*App. "B"*, *infra*, pp. 41-42; *App. "C"*, *infra*, pp. 43-44); *In re New York, S. & W. R. Co.*, 36 Fed. Supp. 158, 161, 162). It has not been argued or briefed in the other cases, but one of the orders of the District Judge in the Central Railroad case refers to "doubt" and "intricacies" that require "careful study of the statutory and case law on the subject and the submission of briefs to the Court" (*App. "F"*, *infra*, pp. 48-49). In both the Erie and the Central Railroad cases express reference has been made to the above entitled (Arkansas) case as a reason for delaying action on those claims (*Supra*, pp. 5 and 6).

(c) This is the first case in which this Court has taken jurisdiction to hear and determine the issue of the application of, and jurisdiction of the District Courts under, section 64(a) in railroad reorganization proceedings under section 77, and its decision in the above entitled (Arkansas) case will have an important influence upon the decision of this issue (and cognate issues) in the proceedings respecting the tax claims of the State of New Jersey.

(d) While the State of New Jersey is mindful of the rule which prevents this Court from deciding any issues outside of those raised, or involved, in the petition for *certiorari*, or arising *sua sponte* in the consideration of, the

above entitled cause, it deems it important that the Court be informed of the ramifications of, and of the widespread public interest in, the questions here involved as they confront other state governments through the disruption of the orderly processes of tax review and collection, and the hardships which fall upon state governments, institutions and citizens, as a result of duplications of state and federal jurisdictions, and protracted delays in the collection of large amounts of necessary public revenue upon which their proper functioning depends.

ARGUMENT.

1.

Section 64(a) of the Bankruptcy Law has no application in a reorganization proceeding under section 77 of that law.

Jurisdiction of the District Court was assumed under the following *proviso* of section 64(a) (*11 U. S. C. A., Sec. 104, Cum. An. Pocket Part, 1940, p. 18*):

“That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court”;

Purpose.

The purpose of section 64 was to have tax claims ascertained and determined before the first dividends are declared, *In re Stavin*, 12 Fed. (2d) 471. It was stated as follows in a decision of the First Circuit (November 27, 1940) in *Cohen v. United States*, 115 Fed. (2d) 505, 507.

"In ordinary tax collection proceedings, the taxpayer pays under protest the tax assessed and files a claim for refund. Frequently there is a delay of several months before the Commissioner acts on the claim, and it is only after its disallowance that suit for recovery is brought. All of this points to delay in determining finally the validity of the tax. It is the intention of the Bankruptcy Act that estates be closed promptly. If the trustee should pay the tax under protest, file a claim for refund and sue to recover, then the bankruptcy proceedings would not be closed for a long time and the very purpose of the act would be defeated. In re Sheinman, *supra* (14 Fed. (2d) 323); In re Universal Rubber Products Co., D. C. W. D. Pa. 1928, 25 F. 2d 168, affirmed 3 Cir., 1928, 28 F. 2d 253; In re W. P. Williams Oil Corporation, *supra* (265 Fed. 401); In re General Film Corporation, *supra* (274 Fed. 903); In re Clayton Magazines, Inc., *supra*" (77 Fed. (2d) 852).

The cases above cited were all decided prior to the enactment of section 77.

In neither Arkansas nor New Jersey is the taxpayer required to pay his taxes in advance of final judicial determination of their amount or legality.

Its purpose was to enable the court to wind up the affairs of the bankrupt and distribute his estate as promptly and as inexpensively as possible. Apparently, only unadjudicated tax claims were under consideration.

There is no such urgency in a railroad reorganization proceeding under section 77, which contemplates the preservation of the property, to be turned over intact, as a going concern, to the same, or a reorganized, company. Experi-

ence indicates that there is ample time in such cases to secure an adjudication of tax claims in the procedure provided by state laws. In all of New Jersey cases such procedure has heretofore been continued, or followed, by the Trustees during the pendency of the reorganization proceedings.

Scope.

The *proviso* above quoted follows, and is necessarily limited to, the scope of paragraph (a) of that section. It was first enacted in 1898 (30 Stat. 563, c. 541) as part of the bankruptcy law, and subsequently amended at various times down to its enactment of its present form in 1938 (52 Stat. 874, c. 575).

Prior to the enactment of the present section 77, chapter 8, of the bankruptcy law, on March 3, 1933 (11 U. S. C. A., sec 205, p. 84), there was no provision in the bankruptcy laws relating to railroads, or for the reorganization of railroads in the bankruptcy courts. That section conferred an *additional* jurisdiction upon the District Courts.

Such proceedings were not within the contemplation of Congress when it enacted section 64(a) or any of its amendments prior to that of 1938, and that amendment contains nothing to indicate an intention that the application of the section should be *extended* to proceedings under section 77. If such an intention existed it could have been expressed in a few words. An "immunity from local laws will not be read into the Bankruptcy Act" *Boteler v. Ingels*, 308 U. S. 57, 61.

The following portions of section 64(a), totally inapplicable to, and inconsistent with, section 77 proceedings,

demonstrate that it was intended to apply only to liquidation cases.

(1) Debts are prior to "the payments of dividends to creditors."

(2) Involuntary cases are included.

(3) "Cost and expense" is to be allowed to "creditors" for their recovery, "for the benefit of the estate of the bankrupt"; of "property of the bankrupt" "transferred or concealed by him either before or after the filing of the petition".

(4) The trustee is to be allowed the "cost and expenses" incurred "in opposing the bankrupt's discharge".

(5) References throughout are to the "bankrupt". Railroads in reorganization proceedings under section 77 are not bankrupts; they are referred to as "debtors". Their petitions do not allege insolvency, but only, as the statute permits, that the debtor is without funds to pay and discharge the obligations that are then due, or as they mature, and that they have no means of borrowing or procuring sufficient funds to pay or discharge the same. The orders approving the petitions do not adjudge them bankrupt, or insolvent. In fact, if the plan of reorganization fails for any reason the court's jurisdiction under section 77 ends; the whole proceeding is dismissed and title to the estate reverts to the debtor. This was pointed out by this Court in *Lowden v. Northwestern Nat. Bank & T. Co.*, 298 U. S. 160, 164, where the court also said (at page 163) that—

"A proceeding to reorganize is not a bankruptcy, although an amendment to the bankruptcy act creates and regulates the remedy."

That case involved a railroad reorganization proceeding under section 77.

The main function of section 64 is to fix the priority status of claims in liquidation cases in which the liabilities exceed the assets. Since taxes are invariably statutory prior liens upon the property and franchises of railroad companies, it is unnecessary to establish their priority, and the full powers of the court under section 77, are broader than under the bankruptcy act (*Lowden v. Northwestern Nat. Bk. & Tr. Co.*, 298 U. S. 160, 164), and sufficient for all purposes of fixing priorities among statutory lienors, and among secured and unsecured creditors, and for apportioning the securities, or cash, of the reorganized company according to their equities. Since no liquidation is contemplated, no occasion arises for an apportionment of the proceeds of a sale of assets, among the different claimants, security owners or creditors.

While paragraph (1) section 205 U. S. C. A. (sec. 77) confers upon the court the same jurisdiction and powers "as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the Debtor's petition was filed", but they may be exercised *only* insofar as such jurisdiction and powers are "consistent with the provisions thereof".

A decree adjudicating a petitioner bankrupt and directing a liquidation of the company is impossible under section 77. Other sections of the general bankruptcy laws, like section 96, are explicitly included by section 77.

Paragraph (o) of section 77B (11 U. S. C. A. sec. 207) is identical with paragraph (1) of section 77, but in addi-

tion thereto, section 77B (*Pgf. k*) provides that if the reorganization plan fails the court may order liquidation, in which event, only, "debts shall be entitled to priority as provided in section 104 (sec. 64, U. S. Code) of this title" (*11 U. S. C. A., sec. 207*).

The express inclusion of the provisions of section 64 in section 77B for use in case of liquidation, only, and their omission from section 77, under which no liquidation is possible, is significant and implies a clear intent of Congress that section 64 was intended, as its text indicates, to apply only to the distribution of assets in liquidation cases. Liquidation was provided for in section 77B, but is hostile to the purposes of section 77. This principle is supported by Judge Wilkerson, concurring in the conclusions of Judge Pray, *In re Chicago, M. St. P. & Pacific R. Co.*, 27 Fed. Supp. 685, decided May 3, 1939.

In *City of Springfield v. Hotel Charles Co.*, 84 Fed. (2d) 589, the First Circuit, in a section 77B proceedings, held that section 64(a) had no application to tax claims unless and until there was an order of liquidation. The same holding appears *In re A. V. Manning's Sons*, 16 Fed. Supp. 932; *In re New York O. & W. Ry. Co.*, 25 Fed. Supp. 709, 713, and *Texas Co. v. Blue Way Lines, Inc.*, 93 Fed. (2d) 593.

Numerous decisions deal with the similarity of Sections 77 and 77B of the Bankruptcy Act, and the structure of the Act itself implies, (*In re New York, O. & W. R. Co.*, 709, 712-713) that the two sections are analogous; one extending the relief and remedy of reorganization to railroad corporations (section 77), and the other to non-railroad

corporations. So long, therefore, as reorganization proceedings obtain under the two sections, like rules of applicable law and procedure should be employed in implementing the policy of Congress as set forth in the Bankruptcy Act.

When a Section 77B proceeding is converted into a liquidation proceeding, the special provisions applicable to the latter proceeding apply and such proceeding becomes fundamentally different from that of a corporate reorganization. In fact, it becomes a straight bankruptcy case.

Liquidation requires the winding up of an estate, the cessation of corporate existence and the distribution of net assets, if any, over and above its liabilities. Reorganization, on the other hand, contemplates the continued existence of the corporation and the preservation of the corporate existence and property. After the overhauling, the same, or a new, corporation carries on. If a plan for reorganization fails of approval, the estate is returned to the debtor in its old form. *In re Chicago, M., St. P. & Pac. R. Co.*, 27 Fed. Supp. 685, 686-7; *In re New York, O. & W. Ry. Co.*, 25 Fed. Supp. 709, 712-713. "By that time there may even be ability to pay dividends as they mature. What is done at the beginning amounts to little more than a provisional sequestration to give protection for the future," *Lowden v. Northwestern Nat. Bank & T. Co.*, 298 U. S. 160, 164.

Paragraph 1 of Section 77 is *not consistent* with the provisions of a reorganization proceedings, since reorganization alone is possible under Section 77. There is no provision here, as there is under Section 77B, for converting the reorganization proceedings into one in liquidation;

hence there is no need for applying Section 64(a) as there is if a Section 77B proceeding goes into liquidation under paragraph (k) (5) thereof.

Another reason why section 64 does not apply in a section 77 proceeding is that section 77(b) carries its own exclusive and comprehensive provision (inconsistent with section 64) respecting creditors and claims, and section 96 is the only part of the bankruptcy law that is called to its assistance in dealing with those subjects. Upon this hypothesis it was held (*In re Chicago, M., St. P. & Pac. R. Co.*, 27 Fed. Supp. 685, 687-8) that section 57j of the bankruptcy act did not apply in a section 77 proceeding. That decision held that paragraph (l) could not be construed to override paragraph (b), of section 77.

The court, *In re New York, O. & W. Ry. Co.*, 25 F. Supp. 709, while recognizing the analogy between section 77 and the reorganization part of section 77B (pp. 712-13), fell into error in holding that section 64(a) was applicable to a section 77 proceedings in reorganization, while at the same time holding that it did not apply under 77B proceeding while it remained a reorganization proceeding.

It is manifest from the decisions in *Texas Co. v. Blue Way Lines, Inc.*, 93 F. 2d 593 (1937), *City of Springfield v. Hotel Charles Co.*, 84 F. 2d 589 and *In re A. V. Manning's Sons*, 16 F. Supp. 932, that so long as a proceedings under 77B remains a reorganization proceeding (77 is always a reorganization proceeding) Section 64(a) does not apply, since the same is consistent only with liquidation and not with reorganization.

Tendencies.

Without questioning the power of the District Court to do the things needful to accomplish, within the scope of section 77, the effective reorganization of railroad companies in the interest of efficient transportation service, it is respectfully submitted that there is a tendency to assume, and exercise, a jurisdiction beyond the bounds of necessity should be discouraged. A misconception of the meaning of the words "summary" and "plenary" have been used as justification for the exercise of wide powers. Those terms are borrowed from the English admiralty and ecclesiastical courts. "Plenary" means "full and formal" proceedings, and "summary" applies to proceedings which are more "succinct and less formal," 2 *Chitty Pr.* 481. They are terms of procedure and not of power.

The exercise of the extraordinary powers conferred by section 77 is limited to the powers conferred. It gives no *carte blanche* upon which the court may fill in an unlimited specification of power. It does not leave matters decided by other courts of competent jurisdiction open to readjudication in a section 77 proceeding, just because "different judicial minds have different judicial methods of approach" (*App. "B", infra, pp. 41-42*).

The State of New Jersey contends that the provisions of section 77 does not, and should not be interpreted to, require unnecessary conflict and interference with the orderly procedure under state laws respecting such delicate matters of state concern as the assessment and collection of its public revenues. See *Boteler v. Ingels*, 308 U. S. 57, 61, as quoted under point 2.

There is no warrant in section 77, or any other applicable provision of the bankruptcy law, for permitting a railroad company to "escape through a petition for reorganization" taxes "which it will be obliged to pay if the reorganization fails and the suit is dismissed", *In re Chicago, M., St. P. & Pac. R. Co.*, 27 Fed. Supp. 685, 688 (headnote 5).

The Bankruptcy Court is not a sanctuary for delinquent taxpayers. If a prayer (in a reorganization petition) offered on its altar can stop, or deplete, the public revenues, it would be profitable for railroad companies to permit large arrearages of unpaid taxes to accumulate, under the protection of laws (such as those in Arkansas and New Jersey) which permit the payment of such amounts as the taxpayer admits to be due, or as a court may order during a contest of the taxes, and the withholding of the remainder until its validity has been contested through, and been sustained by, all of the courts in the land, and then claim sanctuary in the District Court under a section 77 proceeding.

If the District Court, in such a proceeding, has power to *rehear* and *redetermine* the amount and legality of the tax, and revise or reduce the amount, and to abate or reduce the accrued interest, the exercise of that power would serve only to enrich the debtor's estate, and its security holders and creditors, at the expense of the State and municipal governments and their citizens. The balance of equities is in favor of the public. The public interest in efficient transportation does not require that sacrifice of the states, who are the natal source of corporate existence.

In the Central railroad case, which is illustrative of all the others involved in the New Jersey tax claims, its taxes for the years 1931 to 1939, both inclusive, have been reviewed and contested on all of the issues presented in the Trustees' objections in litigations before the State Tax Commissioner, the State Board of Tax Appeals, the New Jersey Supreme Court, the New Jersey Court of Errors and Appeals, the United States District Court, District of New Jersey, United States Circuit Court of Appeals, Third Circuit, and *certiorari* has twice been denied by this court, *Central R. Co. v. State Tax Commissioner*, 293 U. S. 568; *Lehigh Valley R. Co. v. Martin*, 306 U. S. 651; rehearing denied 306 U. S. 669-670, 1063-4. Petition for *certiorari* was filed March 26, 1941 and is now pending in this Court in the 1934, 1935 and 1936 tax cases. (*Central R. Co. v. Martin*, Nos. 873-890, Oct. Term 1940).

Notwithstanding this litigation over the past decade, in which the assessments and taxes in question have been sustained throughout, the Trustees have submitted, and the District Judge has reserved the right, and announced his intention to try those issues *de novo*, respecting, the same taxes (except 1931), between the same parties and upon the same issues (*App. "E"*, *infra*, pp. 47-48; *App. "G"*, *infra*, pp. 50-51), under section 64(a) of the bankruptcy law, and on March 31, 1941, he entered an order of reference for that purpose. Hence, the State's claim that those issues are *res judicata* in the reorganization proceedings in the District Court. However, the issue of *res judicata* is not pertinent to, and is not argued, in this brief.

The conflict of decision in the District and Circuit Courts on this point have never been reconciled by a decision of this court.

Involved in the question whether section 64(a) is applicable to confer jurisdiction of the District Court in a section 77 proceeding to determine all questions affecting the amount and legality of taxes which have been levied by authority of, and in accordance with, state laws, is the question whether that court has power to make a new assessment, according to its own notion of property and franchise values, or to revise or reduce tax levies whose amount and validity have been adjudicated, and sustained, by state and federal courts of competent jurisdiction, and to abate, or reduce, interest, on taxes in default, computed at the rate prescribed as legal interest (and not as penalties) by the state laws.

The amount and legality of the taxes claimed for the years 1932 to 1939, both inclusive, having been judicially determined and sustained against all of the companies listed in Appendix "A", the State of New Jersey contends that they are not open to redetermination, in a hearing *de novo* in reorganization proceedings under section 77, and that section 64(a) does not confer upon the District Court the power to do so.

There are decisions on both sides of this question in straight bankruptcy cases, and a few in section 77 cases, but the only case in which it has been contended that sections of the bankruptcy act, not expressly mentioned in section 77, did not apply in section 77 proceedings is the above mentioned case of *In re Chicago, M. St. P. & Pac. R. Co.*, 27 Fed. Supp. 685 in which Judges Wilkerson and Pray held that section 57 (j) of the bankruptcy act (11 U. S. C. A., sec. 93(j)) did not apply in section 77 proceedings because it was not explicitly included in that section, and therefore

could not be implicitly included. While that was a District Court decision, the opinion was well considered and written by an experienced and able judge.

The most thorough consideration of the powers of the District Courts under 64(a) appears in Judge Geiger's opinion *In Re Gould Mfg. Co.*, 11 Fed. Supp. 644, which was reviewed in 45 *Yale Law Journal*, at page 754; "Power of Bankruptcy Court to Revise Tax Claims". That decision holds that tax claims are incontestable in the bankruptcy court "except when challenged for illegality because of want of power to levy, or in respect to a failure to pursue indispensable steps of procedure in their assessment and levy." It is reducible to two questions:

- (a) Is the exaction a "tax"?
- (b) Was it levied in accordance with constitution and laws of the sovereignty imposing it?

An exaction levied upon a person or corporation for the support of the government, measured by a valuation of property within the sovereign jurisdiction is undoubtedly a "tax". The second question is answered if the taxes have been fully adjudicated and sustained by courts of competent jurisdiction.

The cases *pro* and *con* were reviewed by Judge Evans (as acting District Judge) *In re 168 Adams Bldg. Corporation*, 27 Fed. Supp. 247 (March 14, 1939), in an opinion which accepts and follows the reasoning and conclusions of Judge Geiger in the *Gould* case. The Circuit Court of Appeals, Seventh Circuit, affirmed (105 Fed. (2d) 704) and this Court denied *certiorari* in *Steinbrecher v. Toman*, 308 U. S. 623.

The decision in the *Gould* case was accepted and followed *In re Schach*, 17 Fed. Supp. 437, 439, which expressly disapproved of the decision in *Henderson County v. Wilkins*, 43 Fed. (2d) 670, and the *Henderson County* case has not been followed in any subsequent case.

The doctrine in the *Gould* case was accepted and followed in *Johnson, Bankruptcy Reorganization* (1936), Sec. 508, p. 442, and *Gerdes, Corporate Reorganizations*, Vol. 1, 1937 Cum. Supp. sec. 400.

An extended quotation appears, at page 25 of the brief for petitioners, from Finletter, *The Law of Bankruptcy Reorganizations* (1939) pp. 343-4, to the effect that section 64 is not applicable in a section 77 proceedings.

In re Lang Body Co. (Boyle v. Hipp), 92 Fed. (2d) 338, the court assumed jurisdiction under 64(a) to hear and determine the question of "whether the assessments were so unreasonably excessive as to be illegal" (p. 340), relying chiefly upon the authority of *Great Northern Ry. Co. v. Weeks*, 297 U. S. 135, which has since been overruled in *Nashville C. & St. L. Ry. v. Browning*, 310 U. S. 362, 371.

The discussion of the *extent* of jurisdiction is not further pursued because the Court may not deem it important in this case to decide that question, but it may have some influence upon the basic question directly involved in this record; namely, whether that court has *any* jurisdiction under section 64(a) to hear and determine the amount and validity of taxes involved in a section 77 proceeding. It is respectfully submitted that section 64 of the bankruptcy law was not necessary to, or incorporated, either explicitly or implicitly, in section 77, and that the District

Court has no jurisdiction under section 64(a) in a reorganization proceeding under section 77.

If there is otherwise no such jurisdiction, it cannot be conferred by the mere filing of tax claims.

2.

Section 64(a) has no application to taxes levied upon the Debtor's property after the filing of a petition for reorganization under section 77.

The implication of issue number 2 as above stated (p. 9) is that section 64(a) may apply to taxes levied before, but does not apply to taxes levied after, the filing of a petition for reorganization. If the contentions of point 1 are correct, they dispose of this point also. The *Arkansas* case involves no taxes levied before, but only those levied *after*, the petition for reorganization was filed. The court below held that it applied alike to taxes levied after, and before, the petition was filed.

However, that is a *negative* decision. The court says:

"* * * we discern no reason to hold that the words 'any taxes' should be restricted as contended for", (taxes levied before the petition was filed) (*R. 40*).

In Hennepin County, Minn., V. M. W. Savage Factories, 83 Fed. (2d) 453, that court held that section 64(a) "does not touch the payment of taxes accruing during the trustee's possession". The conclusion of the court, after a very extensive discussion and review of numerous decisions

(under headnotes 1-2, 4, 5 & 6), is condensed in the following paragraph (p. 456):

"That seems to be a reasonable and sensible interpretation, since such taxes are not in a true sense taxes 'due and owing by the bankrupt', but are ordinary carrying charges of property taken over and used by the trustees under order of the court in the conduct of their own operations and for the benefit of general creditors."

This court denied *certiorari* in that case, 299 U. S. 555.

The *Hennepin County* case began as a section 77B proceedings, but at the time of that decision it had been converted into a liquidation case. If section 64(a) does not apply to taxes accruing during the trustee's possession in a straight bankruptcy (liquidation) case, *a fortiori* it cannot apply in a section 77 case where no liquidation is possible.

There are a number of decisions holding that section 64(a) applies equally to taxes levied before, and after, the filing of the petition, *In re Preble Corp.*, 15 Fed. Supp. 775, affirmed on other grounds, 84 Fed. (2d) 73; Cert. denied, 299 U. S. 575; *In re Fuoco*, 22 Fed. Supp. 808.

Such holdings are inconsistent with section 124(a) (*U. S. C. A. Title 28*) and with numerous decisions holding that the trustee (and not the debtor) is liable for taxes accruing during his administration of the estate as current expenses incident to the administration of the estate and if the trustee neglects to pay them he may be surcharged therefor, and for any interest or penalties resulting from that neglect. *In re Humeston*, 83 Fed. (2d) 187; *Thompson v. State of Arkansas*, 98 Fed. (2d) 112; *Thompson v. State*

of Louisiana, 98 Fed. (2d) 108; *Florida National Bank v. United States*, 87 Fed. (2d) 896; *J. P. Morgan & Co. v. Missouri Pac. R. Co.*, 85 Fed. (2d) 351, *Cert. denied*, 299 U. S. 604; 3 *Gerdes, Corporate Reorganizations*, Sec. 1181, pages 1884-6 (citing numerous cases); *Johnson, Bankruptcy Reorganization* (1936) Sec. 507, page 439, sec. 508, pages 439-440 (citing cases); *Moore's Bankruptcy Manual* (1939), *Corporate Reorganization*, Sec. 64.05, page 190, page 357, note 25, page 795, Annotation (citing many cases).

In re Pressed Steel Car Co., 100 F. (2d) 147, the Third Circuit made a distinction between franchise taxes accruing prior to, and those accruing during, a reorganization proceedings under section 77B. It held that section 64(a) did not apply to such a reorganization proceedings unless and until there was a decree of liquidation (*p. 152*). It held that taxes accruing during the proceeding were payable by the trustee as operating expenses incident to, and necessary for, the preservation of the franchise of the debtor, which it was the trustee's duty to protect and preserve as a part of the property of the debtor (*p. 151*).

By its explicit terms, section 64(a) is restricted to "(4) taxes legally due and owing by the bankrupt to the United States or any state or any subdivision thereof"; and the proviso for hearing and determining questions as to the amount and legality of any taxes, is directly attached, and limited, to that subdivision (4) of the section. There is no justification for extending the operation of that subdivision to taxes accruing after the debtor has surrendered the possession and control of the property taxes into the hands of a trustee, whose duty respecting such taxes is governed by 28 U. S. C. A. sec. 124a.

We deem the decision of this Court in *Boteler v. Ingels*, 308 U. S. 57, 59, (rehearing denied, 308 U. S. 637) as conclusive on this point. That case involved a motor vehicle license tax, and penalties, imposed by the State of California during the trustee's conduct of the business of a debtor in a section 77B proceedings (p. 60). This Court held that "neither the tax liability nor the penalties incurred by the trustee after bankruptcy are governed by this section or its subdivisions" (sec. 57, relating to the filing of claims). It then considered the Act of June 18, 1934, providing that a trustee conducting a business "shall be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation * * *" (p. 60). With reference to the question whether, in the absence of that act, the operation of a local business by a trustee "makes the business immune from State laws and valid measures for their enforcement", the Court said:

"* * * Clearly, means of permitting such immunity from local laws will not be read into the Bankruptcy Act. At any rate, Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to State taxes 'the same as if the business(es) were conducted by an individual or corporation' * * *. However, petitioner's (the trustee's) contention would exempt a trustee operating a business in bankruptcy from this double tax liability which other delinquents must bear. A State would thus be accorded the theoretical privilege of taxing businesses operated by trustees in bankruptcy on an equal footing with all other businesses, but would be denied the traditional and almost uni-

versal method of enforcing prompt payment."

"* * * The Act of 1934 indicates a congressional purpose to facilitate—not to obstruct—enforcement of State laws; the court below correctly recognized and applied this congressional purpose and its judgment is affirmed" (p. 61).

Thus, the court required the trustee to pay the taxes and penalties imposed by the laws of California upon the business conducted by him.

By the same reasoning, the respondent in the instant case was subject to the laws of the State of Arkansas respecting the payment, or contest, of taxes imposed upon the debtor's estate while in his possession and operation, and the District Court had no jurisdiction to usurp the powers of the state tribunals and by-pass the statutory reviewing processes by adjudicating the amount and legality of those taxes under section 64(a), of the bankruptcy laws, or otherwise; at least, until the state reviewing tribunals had adjudicated the objections of the trustees thereto. There is no more reason for reading section 64(a) into the present situation under section 77 than there was for reading section 57 into the situation, under section 77B, presented in the *Boteler* case (p. 61).

The District Court lacked jurisdiction to hear and determine the amount or legality of said taxes until after the Trustee had exhausted the administrative, and other, remedies for review thereof provided by law.

This contention is supported by *City of Springfield v. Hotel Charles Co.*, 84 Fed. (2d) 589, 591, and *In re A. V. Manning's Sons*, 16 Fed. Supp. 932, 933, it is also supported, in principle, by the decisions in *Nashville C. & St. L. Ry. v. Browning*, 310 U. S. 362; *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 580-1, 584; and *Railroad Commission v. Rowan & Nichols Oil Co.*, 85 L. ed. Adv. Op. 321, 323.

In Arkansas, as in New Jersey, the statute prescribes certain exclusive proceedings for the review of assessments and taxes. The state has a right to limit review of taxes to its prescribed remedies and the necessity of pursuing those remedies does not deny the taxpayer due process of law or any other right. *Burrill v. Locomobile Co.*, 258 U. S. 34, 36-39; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 342-3; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 404; *Illinois Cent. R. Co. v. Minnesota*, 309 U. S. 157, 165; *Atlas Life Ins. Co. v. Southern*, 306 U. S. 563, 570-1.

The obligation to pursue the state remedies to contest taxes levied during his administration of the estate is just as binding upon a trustee as it would have been upon the debtor if no reorganization was pending, since, in a section 77 proceeding, the trustee stands in the shoes of the debtor respecting tax obligations and remedies for review.

This is the rule established in the *Boteler* case discussed above at the end of point 2, and, as there held, the District Court has no jurisdiction to supersede the state processes of tax review, and deny to petitioners "the traditional and almost universal method of enforcing prompt payment" of taxes.

4.

If the District Court possessed jurisdiction under section 64(a) to hear and determine the amount and legality of taxes, it should have withheld its exercise thereof until the Trustee had exhausted the administrative, and other, remedies provided by state law, and until the amount and legality of the taxes had been thus established according to the constitution and laws of the state.

The Trustee's petition in this case was filed before any taxes were in default, and before any attempt had been made for collection. There was no proof that the reorganization proceeding would be interfered with or delayed by pursuit of the reviewing processes prescribed by law, or that all of the Trustee's objections to the amount or legality of the taxes could not have been heard and determined, by due process of law, in the process of such review.

There appears to be no reason, or excuse, for not pursuing the state remedies, except the claim of exclusive jurisdiction in the District Court to hear and determine all questions as to the amount and legality of those taxes, which had not been otherwise disputed or contested.

The cases cited under point 3 also cover this point. Hence, only additional cases will be cited here.

In *Railroad Commission v. Pullman Co.*, 85 L. ed. Adv. Op. 580, a three-judge court possessed an undoubted federal jurisdiction, but this Court applied "a doctrine of abstention appropriate to our federal system whereby the federal court, 'exercising a wise discretion' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary" (p. 582), and reversed and remanded the case for reasons stated, and particularly the following: (p. 583).

"In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands. Compare *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 84 L. ed. 876, 60 S. Ct. 628, 42 Am. Bankr. Rep. (NS) 216."

"We therefore remand the cause to the district court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion. Compare *Atlas L. Ins. Co. v. W. I. Southern, Inc.*, 306 U. S. 563, 573, 83 L. ed. 987, 994, 59 St. Ct. 657, and cases cited."

The case of *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, above cited, involved the same respondent, and a section 77 proceedings of a subsidiary of the same Debtor, as in the present case. This court found that "Bankruptcy courts have summary jurisdiction to adjudicate con-

troversies relating to property over which they have actual or constructive possession." (pp. 481-2),

"But the proper exercise of that control may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to State courts of particular controversies involving unsettled questions of State property law and arising in the course of bankruptcy administration. And, under the circumstances of this case, we conclude that it is desirable to have the litigation proceed in the State courts of Illinois." (p. 483).

"Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of Federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme." (p. 484).

The case was accordingly remanded for appropriate submission to the Illinois state courts (p. 484).

In re New York, O. & W. Ry. Co., 25 Fed. Supp. 709, District Judge Hulbert held that he had jurisdiction under section 64(a) to hear and determine a dispute as to the amount and legality of a tax claim of the City of New York, but that "the exercise of the authority thereby conferred is entirely in the sound discretion of the judge before whom said proceeding is pending". That, and the following, appears at page 713:

"(6, 7) It is in the public interest that Federal Courts of Equity (and a Court of Bankruptcy is a Court of Equity, which has taken jurisdiction pur-

suant to the provisions of Section 77 of proceedings heretofore conducted in the nature of an Equity Receivership) should exercise their discretionary power with proper regard for the rightful independence of State governments in carrying out their domestic policy. It has long been the accepted practice for the Federal Courts to relinquish their jurisdiction in favor of the State Courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the State. There are stronger reasons for adopting a like practice where the exercise of jurisdiction involved an unnecessary interference by injunction with the lawful action of State officials. *Pennsylvania v. Williams*, 294 U. S. 176, 185, 55 S. Ct. 380, 79 L. Ed. 841, 96 A. L. R. 1166.

It is not alleged by the Debtor, as pointed out by Mr. Justice Stone in that case, at page 183, 55 S. Ct. at page 384; 'That the procedure thus provided is inadequate, or that it will not be diligently and honestly followed.' "

There is no reason, on the score of expedition, expense, or otherwise, why respondent could not have a prompt and effective adjudication of his objections to the taxes in question in the state courts, according to the laws and procedure, of Arkansas.

The object of section 77 proceedings is to sequester and preserve a transportation system pending the progress of what in the last analysis is a composition of creditors for relief from the burden of debts or excessive capital structure. The claim of its creditors and security holders arise from voluntary obligations which the court may modify in value or transform in character, according to equitable

principles of priority among securities of basic quality and among secured and unsecured creditors, subject only to the final approval of the creditors.

Taxes are not voluntary obligations. They arise by operation of law from the relationship between sovereign and subject, an essentially reciprocal relationship under which the sovereign grants the franchise of existence accompanied by certain attributes of sovereignty necessary to the construction, maintenance and operation of a common carrier property, and the subsequent protection of the courts, administrative departments, and innumerable state and municipal services, such as fire, police and many others, necessary to the functioning of the corporation, and the use of its property. Without these the trustee could not conduct the business of the debtor. The primary reciprocal obligation of the corporation (and the trustee) is to pay the taxes levied for the support of the government which gives the enterprise life and existence. Such taxes are, at common law, and by statute, imposed as liens upon the property against which they are assessed until they are paid and satisfied, together with statutory interest during delinquency.

The laws under which the taxes are levied, including those which prescribe measures of adjustment, review, and adjudication of disputes affecting their amount and legality, are within the exclusive province of the state. The method of valuation, the amount of taxes to be raised, the tax rate to be applied, the nature and extent of the lien, and the machinery for assessment and collection belong entirely to the legislative branch of the state government.

The State of New Jersey contends that section 64(a) confers no authority on the District Court in a reorganization proceedings to hear or determine the amount or validity of such taxes. If that contention is erroneous then the state submits that the only questions open for determination are (a) whether the exaction is a "tax", and (b) whether it was imposed in accordance with the law and practice authorized or approved by state law. Contention (b) is conceded by the court below in the present case, in *St. Francis Levee District v. Kurn*, 98 F. (2d) 394, *certiorari* denied, 305 U. S. 647. Decisions on both conclusions (a) and (b) are *In re 168 Adams Building Corp.*, 27 Fed. Supp. 247, affirmed 105 Fed. (2d) 704, *certiorari* denied, 308 U. S. 623; *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362; *Central R. R. Co. v. Martin*, 115 Fed. (2d) 968.

Up to and including the time when section 64(a) assumed its present form (1938), and thereafter until the decision of the *Nashville* case on May 20, 1940, it was assumed that the Federal courts had power, on the ground of excessiveness, to review and reduce the amount of state taxes, under the authority of *Great Northern Ry. Co. v. Weeks*, 297 U. S. 135, but that issue is no longer within federal jurisdiction, since the decision of the *Nashville* case. Unless there has been illegal discrimination or a denial of due process under the 14th Amendment, there is no power in the federal courts to hear and determine the issue of excessiveness (amount) of state assessments and taxes, and their legality is determinable solely in the state courts and in accordance with state laws.

The state courts are competent to determine those questions, and any errors on questions of federal law can be

corrected by review in this Court (28 U. S. C. A. sec. 384), *Indiana Mfg. Co. v. Koehn*, 188 U. S. 681, 687, 690, 691; *Keokuk & Hamilton Br. Co. v. Salm*, 258 U. S. 122; *Grubb v. Public Utilities Com.*, 281 U. S. 470, 476; *Am. Surety Co. v. Baldwin*, 287 U. S. 156, 165, 167, 169; *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 95-6; *Worcester County Tr. Co. v. Riley*, 302 U. S. 292, 298; *Minnesota &c. v. Probate Court*, 309 U. S. 270, 277.

Conclusion.

The State of New Jersey respectfully submits—

(a) That the judgment of the court below should be reversed for the reasons above set forth under points 1, 2, and 3;

(b) That if the court concludes otherwise, the judgment of the court below should be reversed and the case remanded with instructions that the trustee pursue the remedies provided by the laws of the State of Arkansas for hearing and determining the amount and legality of the taxes involved, for the reasons above set forth in point 4.

Respectfully,

DAVID T. WILENTZ,
Attorney General,
Attorney for the State of New Jersey.

DUANE E. MINARD,
Counsel.
1180 Raymond Boulevard,
Newark, New Jersey.

April 3, 1941.

Appendix "A".

List of New Jersey Tax Claims.

Railroad Company	Petition Filed	Tax Claim Filed	Amount	Tax Years	USDC
*New York, S. & W.....	6/ 1/37	9/28/37	\$872,393.75	1933-7	New Jersey
*Erie	1/18/38	9/17/38	689,081.45	1933-8	No. D. Ohio, E. D.
*New Jersey & N. Y....	6/30/38	12/27/38	247,519.65	"	"
*Central of N. J.....	10/30/39	12/11/40	12,117,450.68	1932-9	New Jersey
†Ogden Mine		"	3,220.69	"	"
†New York & L. B.....		"	318,305.30	"	"
†Dover & Rockaway....		"	13,636.27	"	"
†Bay Shore Cont'g.....		"	5,528.40	"	"

Total Unpaid Taxes.....\$14,226,936.19
(Exclusive of interest)

* Debtor companies who filed petitions.

† Lessor wholly-owned subsidiaries whose leases have not been disaffirmed and whose property is operated by Trustees of Debtor-lessees for benefit of Debtor's estate.

Appendix "B".**(April 5, 1939.)****Memorandum**

The Court feels it necessary to undertake a consideration of the tax claim by the State of New Jersey against the New York, Susquehanna and Western Railroad now under reorganization before us. We feel that we cannot otherwise perform that plain duty to the bondholders which the statute imposes upon us. Congress has jurisdiction over Bankruptcy and it has imposed upon this Court the present duty of a reorganization.

We understand that the State does not question our jurisdiction *qua* jurisdiction, but does maintain that we are bound by the decision of our own Circuit, *New York, Susquehanna & Western R. R. Co. v. Martin*, 100 F. (2d) 139, cert. den. March 13, 1939. We may find this to be the ultimate conclusion. We do not believe however, that we can reach it without hearings and an examination of the facts underlying the method of assessment of railroad property in New Jersey. We have no doubt that those facts were ably and fully presented in the case above referred to. It is clear that different judicial minds have different judicial methods of approach. It may well be, therefore, that our inquiry will lead us to call for additional testimony or for testimony presented from a different point of view.

The general problem seems to be that discussed by that very great authority, Professor Seligman, of Columbia University in his *Essays on Taxation*. In the Chapter on the General Property Tax, he sets forth what he deems to be the five principal disadvantages of that tax as follows: lack of uniformity or inequality of assessment; lack of

universality or failure to include personal property; incentive to dishonesty; regressivity or the rate increasing as the property or income decreases; and double taxation: and concludes in the following trenchant sentence:

"If we sum up all these inherent defects, it will be no exaggeration to say that the general property tax in the United States is a dismal failure". (P. 31.)

We may say that we are reminded of Walpole's famous observation:

"landed gentlemen are like the flocks upon their plains, who suffer themselves to be shorn without resistance; whereas the trading part of the nation resemble the boar, who will not suffer a bristle to be pluckt from his back without making the whole parish to echo with his complaints". (Sinclair, History of the Public Revenue, Vol. iii, appendix p. 79.)

How far the problem is for the Legislature and how far for the Courts is an important part of any decision we may be constrained to reach. For that reason, any comment thereon at this time is inappropriate.

Counsel will present an order fixing a time for hearings. Such time will be after the conclusion of our last sitting in the Circuit Court of Appeals, June 23rd. Otherwise, counsel will consult their and not the Court convenience. In the meantime, the trustee will withhold payment of any taxes now claimed.

Appendix "C".

(December 12, 1940.)

Order No. 172.

**UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY.**

**IN THE MATTER
of
NEW YORK, SUSQUEHANNA AND
WESTERN RAILROAD COMPANY,
Debtor,**

**Proceedings for
Reorganization.**

No. 26175.

**Order on Trustee's Petition for Instructions Relative
to New Jersey Tax Litigation.**

Upon filing of the petition of Walter Kidde, Trustee herein, praying for instructions relative to litigation of taxes assessed by the State of New Jersey against Debtor's property in said state, and it appearing to the court that the question of the amount and legality of the taxes assessed by the State of New Jersey against Debtor's property for the years 1933 to 1937, both inclusive, is pending and undetermined before this court in the above entitled reorganization proceedings upon a claim filed therefor herein by the State of New Jersey, to which said Trustee has filed objections herein, and it further appearing to the court that this court has jurisdiction to hear and determine the questions so raised, **ORDERED:**

That Walter Kidde, Trustee herein, be and he hereby is authorized and directed to not join in the proposed peti-

tion to the United States Circuit Court of Appeals, Third Circuit, for a rehearing of the consolidated causes referred to in his said petition or in any other proceedings connected with the said appeals.

Dated: December 12, 1940.

WILLIAM CLARK,
U. S. D. J.

Appendix "D".

(January 7, 1941.)

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY.

IN THE MATTER
of
THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,
Debtor.

In Proceedings for
the Reorganization
of a Railroad.
No. 29778.

**Order No. 77 Instructing the Trustees Concerning the Tax
Litigation Now Pending in the United States Circuit
Court of Appeals for the Third Circuit, Involving
the New Jersey State Taxes for the Years
1934, 1935 and 1936.**

Upon reading and filing the duly verified petition of Shelton Pitney and Walter P. Gardner, Trustees of the Debtor, for the direction, instructions and protection of this Court as to whether they, as Trustees of the Debtor, should join or cause the Debtor to join, in a proposed peti-

tion to the United States Circuit Court of Appeals for the Third Circuit for a rehearing of the decision of that Court rendered on or about November 27, 1940; and the matter having been heard in the presence of the Trustees and of counsel for Central Hanover Bank and Trust Company, as Trustee under the Debtor's General Mortgage, the Committee representing the Institutional Group of Bondholders, the Brooks Committee, the Watters Committee, Reading Company and the Debtor; and it appearing from said petition that a petition was filed with said Circuit Court of Appeals on or before December 6, 1940, for an enlargement of the time within which a petition for rehearing might be filed with said Court and that said Court thereupon made an order that the prayer of the petition for enlargement was presented, insofar as the Trustees of the Debtor or the Debtor itself were and are concerned, without authority, and said petition having been filed without any authority from or knowledge upon the part of this Court; and this Court, upon consideration, being unwilling to authorize the filing of a petition for rehearing by the Trustees of the Debtor or by the Debtor itself or otherwise at this time to authorize any action which might be deemed to waive, surrender or curtail the jurisdiction of this Court, sitting as a court of bankruptcy; and good cause appearing herefor,

It is, on this 7th day of January, 1941 ORDERED that the Trustees of the Debtor be and they are hereby instructed and directed not to file or cause the Debtor to file with the United States Circuit Court of Appeals for the Third Circuit a petition for rehearing by that Court of its opinion rendered on or about November 27, 1940 wherein and whereby said Court ruled that the injunctive decrees of the District Court of the United States for the District of New Jersey entered on or about January 25, 1940 should be reversed; and that the Trustees and the Debtor refrain from participating in any such petition or in any argument thereon;

And it is further ORDERED that this Court does hereby expressly reserve for future consideration any and all other questions arising or which may arise in connection with the rights and duties of the Trustees and of the Debtor in respect of the taxes assessed against the Debtor's property for the years 1934, 1935 and 1936;

And it is ADJUDGED that the petition for enlargement of time for the filing with the United States Circuit Court of Appeals for the Third Circuit of a petition for rehearing on the conclusions announced by that Court on or about November 27, 1940, was filed without the knowledge or authority of this Court and without other sufficient or legal authority, and that said petition and the order entered thereon were wholly without force or effect insofar as this Court or the parties to this cause or the property of the Debtor are concerned.

GUY L. FAKE,
U. S. D. J.

Appendix "E".
(January 8, 1941.)

IN THE
UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF NEW JERSEY.

IN THE MATTER
of
THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,
Debtor.

In Proceedings for
the Reorganization
of a Railroad.
No. 29778.

Order No. 78, Instructing the Trustees Not to File Complaint
Pursuant to Revised Statutes of New Jersey, Section
54:26-3, Touching 1941 State Taxes.

Upon reading and filing the duly verified petition of Shelton Pitney and Walter P. Gardner, Trustees of the Debtor, for the direction, instructions and protection of this Court as to whether a complaint should be filed with the State Tax Commissioner against the valuation of \$67,624,953 tentatively fixed by the State Tax Commissioner as the assessed valuation of the Debtor's property as of January 1, 1940 in respect of the Debtor's state taxes for the year 1941; and good cause appearing herefor:

It is, on this 8th day of January, 1941, ORDERED that the Trustees of the Debtor be and they are hereby instructed and directed not to file with the State Tax Commissioner of the State of New Jersey a complaint against the valuation of \$67,624,953 tentatively fixed by the State Tax Commissioner as the assessed valuation of the Debtor's prop-

erty as of January 1, 1940 in respect of the Debtor's state taxes for the year 1941.

And it is further ORDERED that this Court does hereby expressly reserve for future consideration any and all other questions arising or which may arise in connection with the rights and duties of the Trustees and of the Debtor in respect of the taxes which may be assessed against the Debtor's property for the year 1941.

GUY L. FAKE,
U. S. D. J.

Appendix "F".
(January 31, 1941.)

**UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY.**

IN THE MATTER
of
THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,
Debtor.

In Proceedings for
the Reorganization
of a Railroad,
No. 29778.

**Memorandum on Trustees' Petition as to Prosecution of
1939 Appeals Before New Jersey State Board of
Tax Appeals.**

FAKE, District Judge:

It appears from the petition for instructions filed herein on the 29th instant that the opinion of the Court is sought as to the proper course to be pursued by the debtor in respect of the further prosecution of the debtor's appeal from

the New Jersey state tax assessment against the debtor for the year 1939.

It appears that, by virtue of proceedings before the State Tax Commissioner, the debtor's property has been assessed for tax purposes at the value of \$72,624,572. resulting in the imposition of a tax of \$3,415,922.05 for the year 1939, from which the debtor has appealed to the State Board of Tax Appeals. Numerous hearings have been held before that board and the proceedings have now reached a stage at which the debtor is entitled to introduce rebuttal testimony on Monday next. A doubt exists as to whether it should proceed further with said tax appeal in view of the fact that the State of New Jersey has filed its claim for the said taxes with the trustees in the reorganization proceeding, where it may be found that this Court has and should exercise exclusive jurisdiction under Section 64 (a) and other provisions of the Bankruptcy Act.

The question thus raised presents intricacies and can not be answered before Monday next since it requires a careful study of the statutory and case law on the subject and a submission of briefs to the Court. Pending such study and the filing of briefs, it is the view of the Court that the debtor should appear before the State Board of Tax Appeals and there make known the intricacies with which this Court at short notice is confronted as to the law on the subject, and respectfully request an adjournment for two weeks within which time the question presented may be studied and answered.

Filed: Jan. 31, 1941.

Appendix "G".
(February 13, 1941.)

IN THE
 DISTRICT COURT OF THE UNITED STATES,
 FOR THE DISTRICT OF NEW JERSEY.

IN THE MATTER
of
 THE CENTRAL RAILROAD COMPANY
 OF NEW JERSEY,
 Debtor.

In Proceedings for
 the Reorganization
 of a Railroad.
 No. 29778.

**Order No. 84 Instructing Trustees as to Further Prosecution
 by the Debtor of Its 1939 Tax Appeal Now Pending
 Before the New Jersey State Board of Tax Appeals.**

The Trustees of the Debtor having on January 29, 1941 filed in this cause their petition for the instructions of this Court as to the proper course to be pursued in respect of the further prosecution of the Debtor's appeal from the the New Jersey State tax assessment against the Debtor for the year 1939, now pending before the New Jersey State Board of Tax Appeals; and this Court having taken the matter under advisement and being of the opinion that the Debtor may continue to prosecute said appeal to a final determination by said State Board of Tax Appeals, without in anywise limiting or affecting the jurisdiction or powers of this Court under the bankruptcy laws of the United States in such case made and provided,

It is, as of this 13th day of February, 1941, on motion of the Trustees, ORDERED that the Trustees of the Debtor

be and they are hereby instructed that the Debtor may continue to prosecute its 1939 tax appeal to a final determination by the New Jersey State Board of Tax Appeals.

And it is further ORDERED that if any question arises as to the amount or legality of any tax assessed against the Debtor, or as to any tax claim heretofore or hereafter filed against the Debtor's estate or against the Trustees of the property of the Debtor, such question shall be heard and determined by this Court.

GUY L. FARE,
U. S. D. J.

Filed: February 13, 1941.

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SUPREME COURT OF THE UNITED STATES.

No. 715.—OCTOBER TERM, 1940.

The Arkansas Corporation Commission
and Fifty-one County Tax Collectors
of Arkansas, Petitioners,

vs.

Guy A. Thompson, as Trustee of Mis-
souri Pacific Railroad Company,
Debtor.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Eighth Circuit.

[April 28, 1941.]

Mr. Justice BLACK delivered the opinion of the Court.

This case raises questions concerning the right and power of a federal bankruptcy court to revise and redetermine for state tax purposes the property value of a railroad (Missouri Pacific) in reorganization under section 77 of the Bankruptcy Act, the state (Arkansas) having already determined such value through its own taxing officials and in accordance with the procedure prescribed by valid state legislation.

Over the objections of Arkansas officials, the District Court sitting in bankruptcy held that it did have such power. 33 F. Supp. 728. The Circuit Court of Appeals affirmed. 116 F. (2d) 179. In so holding, both courts relied on section 64(a) of the general bankruptcy act, 11 U. S. C. § 104(a) (Supp. 1939), as the source of this power. That section, so far as pertinent here, provides "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates . . . shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State . . . : Provided, . . . That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the [bankruptcy] court"

Petitioners contend that section 64(a) is in its entirety inconsistent¹ with the aims and purposes of section 77, 11 U. S. C. § 205

¹ Section 77(1) provides: "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, . . . and the rights and liabilities of creditors, . . . shall be the same as if a

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(Supp. 1939), and that it therefore has no application here. That question we need not decide. For we are of opinion that the Congressional language giving to the bankruptcy court power to determine the "amount or legality" of taxes does not mean that the court is given power to redetermine and revise the property value finally fixed by a state under the circumstances revealed by the trustee's petition, even though that value is the basis used in computing the amount of taxes "legally due and owing."

An explanation of the power, functions, and action of the Arkansas Corporation Commission is essential to a clear understanding of this case. That Commission is a state agency created pursuant to state constitutional requirements.² It is vested with broad authority in the regulation of railroads, canals, turnpikes, public utilities, motor vehicles, sleeping cars, telephone and telegraph companies, and companies transmitting and distributing gas, oil and electricity.³ Also, in the administration of the state tax laws the Corporation Commission has general and complete supervision and control over the valuation, assessment and equalization of all property. Before entering upon his duties in the assessment of property, each member of the Commission must subscribe to an oath that he will well and truly value and assess all property required to be assessed.⁴ The Commission has full power to summon witnesses and hear evidence, but further, before assessments are finally determined, all persons interested have the right, on written application, to appear and be heard.

The Missouri Pacific has been in reorganization under section 77, with respondent as trustee, since 1933. In 1939, as in the preceding years, the railroad's properties were being operated by the

voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed." (Italics supplied.)

Among the federal court decisions cited in briefs supporting the petition as bearing on the issue of inconsistency between sections 64(a) and 77, either directly or indirectly, are the following: *Lowden v. Northwestern National Bank & Trust Co.*, 298 U. S. 160, 164; *In re Chicago, M., St. P. & P. R. R.*, 27 F. Supp. 685; *City of Springfield v. Hotel Charles Co.*, 84 F. (2d) 589; *In re A. V. Manning's Sons*, 16 F. Supp. 932; *In re New York, O. & W. Ry.*, 25 F. Supp. 709; *Texas Co. v. Blue Way Lines*, 93 F. (2d) 593; *Henderson County v. Wilkins*, 43 F. (2d) 670. And see Finletter, *The Law of Bankruptcy Reorganization* (1939) pp. 343-344.

² Ark. Dig. Stats. (Pope, 1937) § 1930.

³ *Id.*, §§ 1930-2128.

⁴ *Id.*, § 2042.

trustee. The Commission, after a hearing in which the trustee participated, fixed the value of the railroad's Arkansas property, and levied an assessment for 1939. The trustee's motion for rehearing was heard, considered, and overruled by the Commission. The trustee concedes here that the hearing granted by the Commission was in "full compliance with all the administrative steps required by the Arkansas statute." Under controlling Arkansas law, it is provided that "Within thirty days after the entry on the record of the said Arkansas Corporation Commission of any order made by it, any party aggrieved may file a written motion with any member of such commission or with the secretary thereof praying for appeal from such order to the circuit court of Pulaski County; and thereupon said appeal shall be automatically deemed as granted as a matter of right without any further order."⁵ Any party aggrieved by the Circuit Court's decision may then obtain as a matter of right an appeal to the Supreme Court of the state.⁶ It is provided by statute that preferential standing on the docket be given to appeals from the Commission to the Circuit Court, and from the Circuit Court to the Supreme Court.

The Commission's final order fixing the value of the railroad's property for tax assessment was entered on December 4, 1939. The trustee did not appeal to the Circuit Court of Pulaski County within thirty days as authorized by Arkansas law, and the assessment of the Corporation Commission thereupon became final. Thus tested by Arkansas taxation legislation, the assessed taxes were, in the language of section 64(a), "legally due and owing" to the state in the "amount" fixed by the Commission, and were not subject to further judicial review, unless the special circumstance that a taxpayer is in bankruptcy or reorganization places it in a separate tax classification different from that of all other Arkansas taxpayers.

But three months after the expiration of the time allowed by the state for the trustee to appeal from the Commission's order—specifically, on April 11, 1940—the trustee petitioned the bankruptcy court, sitting in Missouri, to determine the "amount or legality" of the Arkansas tax by revising the property value found by the Corporation Commission and upon which the amount was based. The

⁵ *Id.*, § 2019.

⁶ *Id.*, § 2020.

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basis of the trustee's petition was that the Commission had made an overassessment, in that after a hearing it had determined the property to be worth far more than its actual value. This argument rested upon a contention that the Commission had overvalued the property by giving "predominant weight . . . to original cost and to cost of reproduction, and wholly inadequate consideration . . . to the market value of the railroad's stocks and bonds and to an enormous reduction in earnings occasioned by general business considerations and to rapid increase of competition from buses, trucks, water and air." The bankruptcy court was asked to find the Commission's tax assessment illegal upon three grounds: (1) The value determined by the Board was greatly in excess of the fair market value of the railroad's property and therefore there was a violation of that section of Arkansas law which provides that the assessment shall be "upon the consideration of what a clear fee simple title thereto would sell for under conditions under which that character of property is usually sold." (2) The assessment was in violation of Section 5 of Article 16 of the Constitution of Arkansas which provides that all property shall be taxed according to its value and that no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, and that all values shall be ascertained so as to make the same equal and uniform throughout the state. (3) The alleged excessive valuation fixed by the Commission was in violation of the Fourteenth Amendment of the Constitution of the United States.

It is thus obvious that the trustee's petition, which the bankruptcy court refused to dismiss, rested entirely upon the assumption that section 64(a)(4) gave the bankruptcy court power to hold a completely new hearing in order to set its own value on the property, regardless of the value fixed by the state through its expert and specially constituted quasi-judicial agency.⁷

But we do not so interpret section 64(a)(4). What section 64(a)(4) relates to is "taxes legally due and owing by the bank-

⁷ *Id.*, § 2044.

⁸ Among the lower federal court decisions discussing the power of bankruptcy courts under section 64(a)(4) are: *In re Gould Mfg. Co.*, 11 F. Supp. 644; *In re 168 Adams Building Corp.*, 27 F. Supp. 247, affirmed, 105 F. (2d) 704; *In re Schach*, 17 F. Supp. 437, 439; *In re Lang Body Co.*, 92 F. (2d) 338; *Henderson County v. Wilkins*, 43 F. (2d) 670.

rupt." And what that section further provides is that "in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court;" Nothing in this language indicates that taxpayers in bankruptcy or reorganization are intended to have the extraordinary privilege of two separate trials, one state and one federal, on an identical issue of controverted fact—the value of the property taxed. Manifestly, whether or not taxes are "legally due and owing" to a state depends upon the valid laws of that state. Ad valorem taxes depend upon a determination of value. The governmental function of fixing the value for tax purposes has rarely, if ever, been a judicial function. The "legality" of the action of Arkansas in entrusting the determination of value to its Corporation Commission is not challenged here, as of course it could not be. If the Commission properly found the value of the property, the "amount" of the taxes is not in question. For it is not asserted that the Commission made an improper arithmetical computation in applying the legal tax rate to the determined property value. It is in this respect, as well as with regard to the dissimilar duties and functions of the state administrative agencies involved, that this case differs from that of *New Jersey v. Anderson*, 203 U. S. 483, upon which the trustee here strongly relies. In that case, as here, the relevant provision of section 64(a) was relied on as authorizing the bankruptcy court to determine the "amount or legality" of taxes. New Jersey had imposed a franchise tax upon the outstanding—not the authorized—capital stock of corporations, varying in proportion to the number of shares. A state agency, without a hearing, imposed a tax on the \$40,000,000 authorized stock of the company involved, when in fact the company had only \$10,000,000 of such stock outstanding. This Court said: "It may well be doubted whether the board had power to tax any other stock [except that outstanding]. But be that as it may, section 64(a) specifically provides that in case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the court, with a view to ascertaining the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character, and that the claim should have been upon

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the basis of the capital stock actually outstanding." But in that case the trustee argued in his brief before this Court that under controlling New Jersey law "the assessors acted ministerially, not judicially", their "determination was merely computation", and their actions exceeded their statutory authority.⁹

The Arkansas Corporation Commission, however, does not act ministerially. On the contrary, it is a quasi-judicial agency entrusted with wide responsibilities in connection with the general tax system of the state. Upon it the state relies for the hearing and determination of matters essential to the maintenance and fair functioning of a uniform tax system. For reasons deemed suitable to it, the state has elected to confide this duty to the same agency which has power to exercise statewide regulatory supervision over public utilities, including railroads. The difficulties in fixing railroad valuations are well known, and have been many times adverted to by this Court.¹⁰ The Corporation Commission has been chosen by Arkansas as the ultimate guardian of the rights of the state and its taxpayers, subject only to that judicial review provided for by the state. "The State has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law." *Chicago, B. and Q. Ry. v. Babcock*, 204 U. S. 585, 598.

If the trustee had availed himself of his right of appeal to the courts of Arkansas, with an ultimate right of appeal to this Court for final determination of federal questions, it is difficult to believe that it would now be seriously argued that Congress, by section 64(a)(4), intended to impose upon the bankruptcy court the unusual power and delicate duty of trying out afresh the facts found by the state with relation to the value of property. And there is no more reason to assume that Congress intended that the bankruptcy court should fail to give respect to an unappealed determination of value made by the Arkansas Corporation Commission. Bankruptcy and reorganization proceedings today cover a wide area in the business field. But there is nothing in the history of

⁹ In advancing this argument counsel called attention to the case of *People's Investment Co. v. State Board of Assessors*, 66 N. J. L. 175, in which the Court had said that it was beyond the jurisdiction of the tax agent to levy a tax on any but the outstanding capital stock. Counsel also relied on *Arimex Copper Co. v. State Board of Assessors*, 69 N. J. L. 121.

¹⁰ E. g., *Nashville, C. and St. L. Ry. v. Browning*, 310 U. S. 362, 370; *Rowley v. Chicago & N. W. Ry.*, 293 U. S. 102, 109, and cases cited.

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bankruptcy or reorganization legislation to support the theory that Congress intended to set the federal courts up as super-assessment tribunals over state taxing agencies. The express legislative purpose of Arkansas to move towards a more nearly uniform and fairly distributed tax burden through relying on supervision by a single agency could be in large part frustrated by the construction of the Bankruptcy Act for which the trustee here contends. Section 64(a), thus construed, would tend to obstruct, and not to facilitate, the enforcement of state tax laws.¹¹ Nothing in the language of the Act requires such a construction. And the policy of revising and redetermining state tax valuations contended for by the trustee would be a complete reversal of our historic national policy of federal non-interference with the taxing power of states.

For the reasons given, it is our opinion that the District Court should have dismissed the trustee's petition.

Reversed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

¹¹ *Boteler v. Ingels*, 308 U. S. 57, 61; *Healy v. Ratta*, 292 U. S. 263, 270; *Pennsylvania v. Williams*, 294 U. S. 176, 185. Cf. Bankruptcy Act of 1867, § 28(5), 14 Stat. 531; Act of June 18, 1934, 28 U. S. C. § 124(a), 48 Stat. 993.

